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No. 87-.....

In The
Supreme Court of the United States
October Term, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,

Petitioners,

v.

UNITED STATES OF AMERICA, AND MBANK ABILENE, N.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Bruce W. Claycombe
Counsel of Record
Kenneth L. King
Claycombe & King
2424 Allianz Financial Centre
2323 Bryan Street, LB 159
Dallas, Texas 75201
(214) 220-2424

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Is the Fifth Circuit's decision that 12 U.S.C. § 91 prohibits collection of a judgment against a national banking association during an appeal from the judgment contrary to this Court's holding in *Third National Bank v. Impac, Ltd., Inc.*, 432 U.S. 312 (1977) in that the Fifth Circuit's holding:

   (a) grants to national banks a privilege unavailable to other competing lenders; and,

   (b) is contrary to this Court's holding that "[F]airly read, the statute merely prevents prejudgment seizure of bank property by creditors of the bank"?

2. Is the Fifth Circuit's decision contrary to this Court's holding in *Pierson v. Ray*, 386 U.S. 457 (1967) because it construes 12 U.S.C. § 91 contrary to its ordinary meaning and in derogation of common law in the absence of any specific expression of Congress to that effect?

3. Is the entry of a preliminary injunction by a United States District Court to prohibit the issuance of post judgment process against a judgment debtor national banking association appropriate in view of the fact that the injunction permits the judgment debtor to dissipate its assets during the appeal of the state court judgment by paying all creditors other than the judgment creditors?

4. Does a United States District Court have subject matter jurisdiction to enjoin the issuance of process to collect a state court judgment against a national banking association pending the appeal of the state court judgment?

PARTIES TO THIS PROCEEDING

In addition to those parties named in the caption, the following are also parties to this proceeding:

Hilmar Zeissig, Defendant/Appellant

Bert Scales, Defendant/Appellant

Dieter Scherfenberg, Defendant/Appellant

Federal Deposit Insurance Corporation (Plaintiff/Appellee, represented by the United States of America)

Office of the Comptroller of Currency (Plaintiff/Appellee, represented by the United States of America)

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit, which is reported at 826 F.2d 387 and reprinted as Appendix A. The Fifth Circuit's order denying rehearing is unreported and

reprinted as Appendix B. The memorandum opinion and preliminary injunction of the United States District Court for the Northern District of Texas, Abilene Division (Belew, D.), are unreported and reprinted as Appendices C and D.

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JURISDICTION

The decision and judgment of the Court of Appeals were entered on September 9, 1987. A suggestion for rehearing *en banc* was denied on October 9, 1987, and the mandate issued on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1982).

———o———

STATUTE INVOLVED

12 U.S.C. § 91 (1982) reads as follows:

> Transfers by bank and other acts in contemplation of insolvency
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating

notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

STATEMENT OF THE CASE

A. Proceedings in the state court.

On August 12, 1986, the 240th District Court for Fort Bend County, Texas, entered a judgment in excess of $69 million against MBank Abilene, N.A., and in favor of Harry LeMaire, Richard Patton, Hilmar Zeissig, Bert Scales and Dieter Scherfenberg. The judgment was entered on a jury verdict, returned on June 19, 1986 after a five (5) week trial. The jury found that MBank Abilene had breached its contract with the plaintiffs, had defrauded the plaintiffs, had tortiously interfered with other contract rights of the plaintiffs, had violated the Texas Deceptive Trade Practices Act and had libeled Messrs. Patton and LeMaire.

On the date the state court judgment was entered, MBank Abilene presented an order, *ex parte,* to the state trial court judge, which was entered by the trial court. The order stayed enforcement of the judgment pending exhaustion of all rights of appeal. When the state court plaintiffs learned of the entry of the *ex parte* order, they filed a motion to set aside the *ex parte* order and, on September 2, 1986, the trial court withdrew its previous order staying enforcement of the judgment.

On September 4, 1986, MBank Abilene filed a motion for leave to file a petition for writ of mandamus with the Texas Court of Appeals, asserting that 12 U.S.C. § 91 (1982) prevented execution on the state court judgment prior to the exhaustion of all appeals. The Texas Court of Appeals denied the application on September 5, 1986. On or about September 6, 1986, MBank Abilene filed substantially the same motion with the Texas Supreme Court. The Texas Supreme Court denied the motion on September 8, 1986. MBank did not seek review of the decision of the Texas Supreme Court by this Court.

In a post judgment deposition taken on September 16, 1986, the appellants were informed of the following:

a. On August 15, 1986, just three days after the entry of the state court judgment, the bank transferred to a wholly-owned subsidiary of the bank, Anbore, Inc., all real estate owned by it as a result of foreclosure actions, the value of which was estimated at fifteen million dollars. The transfer permitted the bank to avoid the effect of a judgment lien with respect to some of the real estate.

b. On September 9, 1986, the bank pledged approximately twenty million dollars of assets to secure a one million dollar debt owed to the Federal Reserve Bank of Dallas.

c. On September 9, 1986, MBank Abilene pledged its remaining assets, worth in excess of two hundred million dollars, to secure a twenty-five million dollar line of credit with MBank Dallas, N.A., only one million dollars of which was advanced.

d. On September 9, 1986, MBank Abilene withdrew substantially all of its funds from correspondent accounts

it had maintained in its ordinary course of business and deposited those funds with MBank Dallas, N.A.

e. Although the pledge of assets to the Federal Reserve Bank in Dallas and MBank Dallas, N.A., was ostensibly to secure lines of credit for liquidity purposes, MBank Abilene had previously obtained credit on an unsecured basis for liquidity purposes in excess of forty-five million dollars without even so much as executing a note to evidence the debt.

On September 18, 1986, immediately upon the overruling of the bank's motion for new trial, the state court plaintiffs obtained the issuance of writs of garnishment against the Federal Reserve Bank of Dallas, MBank Dallas, N.A., MBank Fort Worth, N.A. and Anbore, Inc.

B. Proceedings in the United States District Court.

On September 22, 1986, the United States filed a complaint in the United States District Court for the Northern District of Texas seeking to enjoin petitioners from collecting their state court judgment against MBank Abilene. MBank Abilene had failed to post a supersedeas bond as required by Texas law to secure payment of the judgment pending the state court appeal.

MBank Abilene, N.A., reported to the district court that it was suffering operating losses in excess of $1.6 million per month and that it had less than twelve million dollars in equity. The uncontroverted evidence at the preliminary injunction hearing was that the appeal by the bank from the state court judgment will not have run its course earlier than June, 1988. It now appears the state appellate process may run well into 1989.

The Federal Deposit Insurance Corporation ("FDIC") held a fifty million dollar certificate of deposit from MBank Abilene which matured and was paid on August 6, 1987. Withdrawals by other depositors since the entry of the judgment have caused the bank's assets to decrease by more than thirty percent. Taking the state court plaintiffs' judgment into account, the bank's liabilities exceed its assets by at least $60 million.

The preliminary injunction was granted on October 24, 1986, on the ground that 12 U.S.C. § 91 (1982) prohibits any collection efforts by judgment creditors against national banks pending an appeal by the national bank judgment debtor. An expedited appeal was taken to the United States Court of Appeals for the Fifth Circuit by Harry LeMaire and Nan Patton, Independent Executrix of the Estate of Richard E. Patton, Deceased, from the preliminary injunction granted by the district court enjoining petitioners from attempting to collect the sixty-nine million dollar state court judgment obtained against MBank Abilene, N.A., during the pendency of MBank Abilene's state court appeal, despite the bank's failure to post a supersedeas bond to secure payment of the judgment.

While the events which precipitated the action by the government were the filing of the writs of garnishment, the preliminary injunction has a far greater effect than merely to enjoin further garnishment by the state court plaintiffs. The effect of the preliminary injunction is to relieve MBank Abilene from posting a supersedeas bond during the entire pendency of its appeal from the state court judgment despite undisputed evidence of continuing and severe deterioration of the financial condition of the

bank and the bank's obvious efforts to remove its assets from the reach of execution.

The preliminary injunction permitted the FDIC to receive a fifty million dollar preferential payment to the detriment of these petitioners and has permitted other preferential payments to all creditors of the bank other than these petitioners during the state court appeal.

C. Proceedings in the Court of Appeals.

On expedited appeal, the Court of Appeals affirmed the trial court's ruling on September 9, 1987, and denied petitioners' suggestion for rehearing *en banc* on October 9, 1987. The Fifth Circuit, in reaching its decision, did not address the limitation placed in 12 U.S.C. § 91 (1982) by this Court in *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 554 (1977), that the statute merely prohibits *prejudgment* seizure of a bank's assets by its creditors. Neither did the Fifth Circuit address the rule of statutory construction announced by this Court in *Pierson v. Ray*, 386 U.S. 457 (1968). Indeed, its opinion cannot be reconciled with that decision because, although the Fifth Circuit has construed the statute in derogation of common law, neither any statutory language nor legislative history justified the result reached by the Fifth Circuit.

ARGUMENT

I.

THIS CASE OF FIRST IMPRESSION IS OF NATIONAL IMPORTANCE.

The decision by the Fifth Circuit in the case below is a case of first impression. Petitioners' $69 million judgment is the largest judgment ever granted against a national bank. The Fifth Circuit held that 12 U.S.C. § 91 (1982) prohibits execution upon the assets of a national banking association during the appeal of a judgment entered against it by a trial court. In effect a national bank now has a right not available to any person or entity other than the sovereign: to take an appeal from the entry of a trial court judgment without posting security for payment of the judgment during the appeal.

Whether a national bank must post a supersedeas bond to prevent execution during appeal is a question of national importance in view of developing state law permitting recoveries against lenders. The Independent Bankers Association of Texas and the Texas Association of Bank Holding Companies sought leave to file briefs as *amicus curiae* with the Fifth Circuit. No doubt, if the Court grants this petition for *certiorari,* many institutions and trade associations may seek leave to appear as *amicus curiae.*

The Supreme Court has construed 12 U.S.C. § 91 (1982) four times previously, most recently in *Third Nat'l Bank v. Impac Ltd., Inc.,* 432 U.S. 554 (1977). While this Court has clearly held that Section 91 prohibits prejudgment process against a national bank, it has also stated that Section 91 is of limited scope and only prevents prejudgment process.

This case involves weighing the significant interests of creditors who have secured a judgment against a national bank after a plenary trial against the interests of other creditors of the bank, including the FDIC, during the appellate process. The Fifth Circuit's decision arms a national bank with the ability to distribute its assets selectively to its friendly creditors to the detriment of creditors hostile to the bank. By allowing a bank to prefer payment of some creditors over others, the Fifth Circuit's decision frustrates the very purpose of Section 91, which is to secure fair and equitable payment to all the creditors of a national bank.

II.

THE FIFTH CIRCUIT FAILED TO FOLLOW THE MANDATE OF THE SUPREME COURT IN THIRD NAT'L BANK V. IMPAC LTD., INC., 432 U.S. 312 (1977), IN THAT THE COURT'S READING GIVES AN UNJUSTIFIED PRIVILEGE TO BANKS WHICH IS UNAVAILABLE TO COMPETING LENDERS; THAT IS, THE ABILITY TO APPEAL THE ENTRY OF A JUDGMENT WITHOUT POSTING SECURITY.

The Supreme Court, in *Third Nat'l Bank v. Impac Ltd., Inc.*, refused to construe Section 91 so as to prevent the entry of a preliminary injunction against a bank to enjoin a bank from foreclosing upon a debtor's property. One of the reasons given was that such a reading would:

> give national banks engaged in the business of making mortgage loans secured by mortgages on real estate a privilege unavailable to competing lenders.

Id. at 323. The Court stated:

We cannot believe that Congress intended to give national banks a license to inflict irreparable injury on

> others, free from the normal constraints of equitable relief.

Id.

The Fifth Circuit's decision has given national banks a license to inflict injury on its hostile, but rightful, creditors free from ordinary restraints imposed on others to post security to pay judgments during appeal. The Fifth Circuit has accorded to national banks a status previously reserved for the sovereign only.

There is no justification for granting to national banks the privilege of appealing judgments entered against them without posting security while other lending institutions are not accorded the same privilege. The state court judgment entered against the bank is supported by a jury verdict finding that the bank committed fraud, deceptive trade practices, breached its contract, and libeled the plaintiffs. No defendant other than the sovereign is entitled to take an appeal from a judgment finding it to have committed such egregious acts without securing the judgment creditor against dissipation of its assets during the appeal.

No privilege such as that purportedly conferred upon national banks by the Fifth Circuit should be conferred upon an institution without a concomitant obligation being imposed on the beneficiary of the privilege. The sovereign is understandably free from the requirement to post security pending appeal. The sovereign is presumed to have sufficient funds to pay its debts and is presumed to act in the best interests of the electorate. National banks are established for the private gain of their shareholders, have no responsibility to the public at large and have no obligation

to act in the best interests of the electorate or their creditors.

Many other institutions compete with national banks and are not accorded the same privilege. State banks, thrift institutions, savings and loans institutions chartered under state and federal law, credit unions, insurance companies, and pension funds, to name only a few, compete with national banks. All are, in one manner or another, repositories of funds entrusted to them by members of the general public and each of them can be denominated a "quasi public institution". Moreover, the purposes for which many of them are instituted are national in character. Yet, the court's opinion grants only to national banks a right deprived of all other such competing institutions, that of the right to act with impunity until the exhaustion of all appellate processes available to them after a judgment has been entered against them. As the Supreme Court stated in *Third Nat'l Bank v. Impac Ltd., Inc.*: "[N]o reason has been advanced for assuming that Congress intended such disparate treatment." *Id.* at 323.

III.

THE FIFTH CIRCUIT'S OPINION IS CLEARLY CONTRARY TO THE INTERPRETATION OF SECTION 91 BY THE SUPREME COURT IN THIRD NAT'L BANK V. IMPAC LTD., INC., WHICH STATED: "[F]airly read, the statute merely prevents prejudgment seizure of bank property by creditors of the bank." Id. at 324.

The most recent interpretation by this Court is *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312 (1977). In that case this Court plainly stated:

> [F]airly read, the statute merely prevents *prejudgment* seizure of bank property by creditors of the bank.

Id. at 324. (Emphasis added.) The introduction to the opinion states:

> A federal statute enacted in 1873 provides that certain *prejudgment writs* shall not be issued against national banks by state courts.

Id. at 312-13. (Emphasis added.) This Court consistently referred to Section 91 as a statute which applies "before judgment" *Id.* at 315; or as applying to "*prejudgment* seizure of bank assets," and as a "prohibition against *prejudgment* orders protecting the assets of third parties, including debtors of the bank." *Id.* (Emphasis added.) Mr. Justice Stevens on behalf of the majority further stated that the original 1864 National Currency Act "did not, however, include the prohibition against the issuance of *prejudgment writs* now found in 12 U.S.C. § 91." *Id.* at 317. (Emphasis added.) Also, in describing the 1873 amendent this Court stated: "[T]he prohibition against *prejudgment writs* was combined with the provision concerning preferential transfers and acts in which contemplation of insolvency to form Section 5242, which is now 12 U.S.C. 91." *Id.* (Emphasis added.)

This Court further stated, "[F]or the past century the prohibition against *prejudgment writs* has remained in the preferential transfer section." *Id.* at 318. (Emphasis added.)

In footnote 6 of its opinion this Court noted that the prohibition against prejudgment seizure of a bank's assets was prompted by state *prejudgment* attachment statutes. Under state law national banks were, by definition, foreign

corporations, whose assets were subject to attachment and even execution at the commencement of suit.[1]

The context in which the term "injunction" was used was crucial to this Court. This Court held that because attachment and execution were means to seize a bank's property, the term "injunction" applied only to efforts to interfere with a bank's property. This Court therefore held that Section 91 did not prohibit prejudgment injunctions to prevent the seizure of a debtor's property by a bank.

Just as the words "attachment", "injunction", and "execution" must be given related meaning, so should the words "State [court]", "county [court]", and "municipal court" be given related meaning. County and municipal courts are trial courts. A "final judgment" is entered in a "suit, action or proceeding" in a "municipal" or "county court" *by* the municipal or county court in the suit. To give "State [court]" a related meaning, one must construe the statute to mean "State trial court".

Even authorities cited by the Fifth Circuit indicate that Section 91 prohibits only prejudgment seizure. The Fifth Circuit contorted the holding of *The Planter's Loan and Savings Bank v. Berry*, 91 Ga. 264, 265 (1872) which

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[1] In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court for the first time required that defendants be accorded a hearing prior to the seizure of their assets. In 1873, the states' statutory prejudgment asset seizure laws permitted attachment and execution on a defendant's property and even the incarceration of the defendant at the commencement of an action prior to a hearing of any kind. See notes 3-14 *infra*. Summary collection procedures to seize a defendant's person or property were available to a plaintiff merely upon the filing of an affidavit. It is against this backdrop of summary collection procedures that the prohibition against prejudgment writs was enacted in 1873.

was footnoted and quoted by this Court in *Third Nat'l Bank*. The Fifth Circuit stated that *Planter's* held that Section 91 was designed to prevent execution before "final adjudication of claims," 826 F.2d at 390. However, *Planter's* merely stated,

> Antejudgment seizures cannot be made; a state can make post-judgment seizures only. Mesne process will not suffice. . . .

91 Ga. at 265. Execution on a final judgment entered by a trial court is not mesne process.

Finally, this Court's review of its prior decisions construing Section 91 removes all doubt about the meaning of "final judgment." In *Third National Bank* this Court quoted from its decision in *Van Reed v. People's Nat'l Bank*, 198 U.S. 554 (1904) wherein this Court held:

> [S]ince the rendition of that decision [*Mixter*], it has generally been followed as an authoritative construction of the statute holding that no attachment can issue from a state court *before judgment* against a national bank or its property.

Id. at 319. (Emphasis added.) This Court also construed its prior decision in *Earle v. Pennsylvania*, 178 U.S. 449 (1900) as demonstrating that

> "under any circumstances" language in *Mixter* had reference to the financial condition of the bank, rather than to any possible cases in which a *prejudgment writ* issues against a national bank.

Third National Bank at 320.

The Court quoted the first Mr. Justice Harlan in *Earle* as having stated that "the ban on *prejudgment writs*

must be construed in connection with the previous parts of the same section", concerning preferential transfers. *Id.* at 320. (Emphasis added.)

> In its own analysis of the statute, this Court stated:
>
> It appears likely that when originally passed the provision barring *prejudgment writs* actually was aimed at preventing preferences by creditors.

Id. at 324. (Emphasis added.) Finally the Court rendered its opinion that "fairly read, the statute merely prevents *prejudgment* seizure of bank property by creditors of the bank." *Id.* (Emphasis added.)

In the 114 years since the enactment of the clause under consideration, it has never been construed by any court to prevent execution upon a judgment entered by a trial court which is final for purposes of appeal. When a statute has been in force for many years and has been before the courts on numerous occasions, the lack of any precedent supporting the particular construction of that statute is itself significant evidence that the newly asserted construction is incorrect. *Massachusetts v. Mellon,* 262 U.S. 447, 487 (1923).

Despite the Fifth Circuit's efforts to conjure a different and more expansive purpose to the 1873 Act, all that can be said relating to the purpose of the Act is that it was intended to eliminate the legal fiction that national banks were foreign corporations under state laws and to insure that a national bank had the benefit of a trial before its assets were seized.

IV.

THE FIFTH CIRCUIT HAS CONSTRUED SECTION 91 IN DEROGATION OF COMMON LAW CONTRARY TO THIS COURT'S DECISION IN PIERSON v. RAY, 386 U.S. 567 (1968).

In *Pierson v. Ray,* 386 U.S. 547 (1968), this Court held that congress will not be presumed to have abrogated a long standing doctrine of common law unless its intent is specific and readily discernible from the act itself or from its legislative history. In *Pierson,* the question was whether 42 U.S.C. § 1983 (1982) ("Section 1983") abolished the doctrine of judicial immunity. The statute by its plain terms imposed civil liability for damages upon all state officials, including judges. The legislative history was silent on whether Section 1983 was intended to abolish the immunity which the common law had long granted to trial court judges. This Court held that the doctrine of judicial immunity was so ingrained in the common law at the time of the enactment of Section 1983 that "Congress would [have] specifically so provide[d] had it wished to abolish the doctrine [of judicial immunity]." *Id.* at 554-55.

The appellate review of civil actions and the posting of supersedeas bonds during appeals have their roots in ancient common law. For more than 100 years prior to the American revolution, the law in England required a person to post a supersedeas to avoid payment of a trial court judgment during appeal. *Omaha Hotel Co. v. Kountze,* 107 U.S. 377 (1882). The same concept has been adopted by the federal and state governments and is a basic tenet of the common law of England, the law of the United States

and the law of the State of Texas. *Id., see also,* Fed.R.Civ. P. 62; Tex.R.Civ.P. 364-368.

Under very early English law, a writ of error suspended collection of a judgment; no security was required to suspend execution during an appeal. English statutes were amended beginning in the sixteenth century when abuses of the writ of error process became evident *Omaha Hotel Co.* at 382-3. The requirement that a bond be posted to supercede execution during appeal reflects an ancient policy determination that balances two competing interests—the judgment debtor's right to the presumption that the judgment is correct coupled with his right to security for payment if he is not to be paid immediately, versus the possibility of trial court error and reversal of the judgment. *See, Omaha Hotel Co. v. Kountze,* 107 U.S. 377 (1882).

A supersedeas bond protects the plaintiff from any deterioration in the judgment debtor's ability to satisfy the debt during the appeal and from the debtor's natural tendencies to transfer his assets beyond the judgment creditor's reach during the appeal. Likewise, the judgment debtor is relieved of the risk that the judgment creditor will be unable to repay the judgment amount in the event the trial court judgment is reversed.

Had Congress intended to grant national banks an exemption from posting security to prevent execution during the appellate process, Congress had the ability to do so. However, its intent would have been clearly evident from the language of the statute. Congress has granted such

exemptions to other institutions, but when it has done so, Congress has spoken in clear unequivocal language. As an example, 28 U.S.C. § 2408 (1982), which exempts the United States and its instrumentalities from posting supersedeas bonds, provides:

> Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.

The Federal Rules of Civil Procedure are likewise very explicit and provide only one exception to the requirement of posting a supersedeas bond:

> When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

Fed.R.Civ.P. 62(e).

National banks are not the beneficiaries of either of these very specific provisions. Further, there is no reason to believe that Congress intended a national bank, a privately owned business, to share the same status as the sovereign.

Section 91 was passed by Congress without any legislative history, debate or even support from the administration. *Third Nat'l Bank v. Impac, Ltd., Inc.*, 432 U.S. 312, 323 (1977). The statute contains no language evidencing a specific intent by Congress to exempt national banks from posting supersedeas bonds to stay execution pending

appeal. Following the reasoning of *Pierson v. Ray*, because the necessity for a judgment debtor to post a supersedeas bond was long ingrained in the common law at the time of the enactment of Section 91, it must be assumed that Congress would have specifically abolished the necessity of posting a supersedeas bond if it had intended to do so.

The government has argued that the prohibition against execution in Section 91 demonstrates that Congress intended to change the common law. However, execution before judgment was available under state statutes in 1873. Prejudgment execution was available in the District of Columbia in 1873. Section VII, Act of October, 1778, Laws of the District of Columbia (1868) at 416. In addition, the laws of some of the states in force in 1873, *e.g.* Kentucky[2], Minnesota[3], Massachusetts[4], Arkansas[5], Iowa[6], New York[7], New Jersey[8], and Ohio[9], and the territories of Washington[10] and New Mexico[11] on their face appear to permit execution before entry of a final judgment by a trial court.[12]

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[2] Ky. Prac. Code, § 207 (1867).

"Sec. 207. Plaintiff may claim immediate delivery. The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the action, or at *anytime before judgment*, claim the immediate delivery of the property, as herein provided." (Emphasis added.)

[3] Minn. Rev. Stat., § 2 (1871).

"Sec. 2. The justice shall annex his certificate to it, record it and deliver it to the creditor; and if the debt is not paid at the time appointed, the creditor may deliver the recognizance to the clerk of the court of the county where taken, who shall record it in a book kept for that purpose, and place it on the files of the court; and at any time within three years after the debt be-

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Given the ability of a party to obtain prejudgment execution in 1873, Congress understandably specifically prohibited prejudgment execution.

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comes due, without any order of court, *he may issue an execution thereon,* including all interest due by the terms of the recognizance, varying the form of the execution accordingly, to be renewed by the clerk, served, and executed by all proper officers, as any other execution." (Emphasis added.)

[4] Mass. Gen. Stat. Ch. 152, § 5 (1861).

"Sec. 5. If the debt is not paid at the time appointed in the recognizance, the conusee shall be entitled to an execution for the sum due, to be sued out of the clerk's office in which the recognizance is recorded, and to be directed, served, and returned, in like manner *as an execution issued upon a judgment of the same court.*" (Emphasis added.)

[5] Ark. Laws, § 2666 (1874).

"Sec. 2666. All such bonds shall have the force and effect of a judgment, *and on which an execution may issue* which execution shall be indorsed that no surety of any kind is to be taken." (Emphasis added.)

[6] Iowa Prac. Code, § 3026 (1860).

"Sec. 3026. Judgments *or orders* requiring the payment of money, or the delivery of the possession of property are to be enforced *by execution.* Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempts." (Note the lack of a requirement that the order be final versus interlocutory.) (Emphasis added.)

[7] N.Y. Rev. Stat. Art. Sixth § 97 (1875).

"§ 97. When a bill shall be filed for the satisfaction of a mortgage, the court shall not only have power to decree and compel the delivery of the possession of the mortgaged premises to the purchaser thereof, but on the coming in of the report of sale, the court shall also have power to decree and direct the payment, by the mortgagor, of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law; and for that

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purpose *may issue the necessary executions,* as in other cases, against other property of the mortgagor, or against his person." (Note the lack of requirement for a final judgment.) (Emphasis added.)

[8] N.J. Rev. Stat. 976 (1846).

"1. Upon judgment obtained, *or to be obtained,* for debt, damages, and costs or other sum of money, in the supreme court, or in any circuit court or court of common pleas of this state, the party obtaining the same may have an execution against the body, or against the goods and chattels, lands, tenements, hereditaments, and real estate of the party against whom such judgment is or shall be awarded; but no execution shall be issued against the proper goods and chattels, lands, tenements, hereditaments, and real estate of any executor, administrator, heir or devisee, unless he or she shall have made his or her estate liable for the money so recovered by false pleading or otherwise." (Emphasis added.)

[9] Ohio Stat. Ann., § 5373 (1906).

"Sec. 5373. [Kinds of execution.] Executions are of three kinds:

1st. Against the property of the judgment debtor, including orders of sale.

2nd. Against the person of the judgment debtor.

3d. For the delivery of the possession of real property, including real property sold under orders of sale; the writ shall contain a specific description of the property, and a command to the sheriff to deliver the property to the person entitled thereto; the writ may also require him to make the damages recovered for withholding the possession, and cost or costs alone, out of the property of the person who so withholds the possession." (The third category requires no entry of a judgment prior to execution.)

[10] 1854 Wash. Laws, § 245 (Executions).

Sec. 245. There shall be four kinds of executions: one against the property of the judgment debtor; another against his person; the third for the delivery of the possession of real or personal property, or such delivery with damages, for withholding the same; and the fourth commanding the enforcement of or obedience to any special order of the court. And in all cases

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The Fifth Circuit has not referred to any previously undiscovered expression of intent on the part of Congress that Section 91 is to act as a writ of supersedeas or that Section 91 is intended to abolish the common law requirement of posting a supersedeas bond by a national bank. Without such an intent the statute cannot be presumed to have changed the common law. *Pierson v. Ray*, 386 U.S. 547 (1968).

V.

THE FIFTH CIRCUIT CONTORTED THE MEANING OF "FINAL JUDGMENT IN ANY SUIT. . . . IN ANY STATE, COUNTY OR MUNICIPAL COURT" BEYOND ITS ORDINARY MEANING.

The Fifth Circuit held that "final judgment" must be given a federal law meaning. However, under federal law,

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there shall be an order to collect the costs. (The third and fourth categories do not require the entry of judgment before execution.)

[11] N.M. Code Civ. P., Ch. XXXIV, § 1 (1865).

"Section 1. The party in whose favor any judgment, order or decree in any court may be returned, shall have execution therefor in conformity to the order, judgment, or decree." (No requirement that the judgment, order or decree be final.) In New Mexico a creditor could obtain a writ of capias which subjected the alleged debtor to arrest and incarceration at the commencement of an action. N.M. Code Civ. P., *Capais* Writs §§ 5-7.

[12] *Compare*, Tex. Civ. Stat., art. 1337 (1879).

"Art. 1337. Only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law."

Execution would issue only after the adjournment of the term of the court for cases in which final judgments had been entered during that term. Tex. Civ. Stat., art. 2267 (1879).

words in a statute are to be given their ordinary meaning. *United States v. 525 Co.*, 342 F.2d 759 (5th Cir. 1965); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962).

The ordinary and historical meaning of "final judgment" is a trial court judgment which determines the rights of all the parties and disposes of all the issues involved in the suit. This meaning had long been established in the common law by 1873, the date Section 91 was amended. *See e.g. Metcalf's Case*, 11 Coke 38, 77 Eng. Rep. 1193 (1615). That meaning was carried forward into American jurisprudence in the first judiciary act. Act of September 24, 1789, 1 Stat. 73, § 22.1.[13]

The Fifth Circuit has also taken the words "final judgment" out of the context of the statute. As has been stated above, the statute refers to final judgments in *suits, in* state trial courts. The petitioners are obviously the holders of a "final judgment" in a "suit" in a "State" court.

In justifying its interpretation of "final judgment", the Fifth Circuit cited instances where the term "final judgment" has been used in a manner other than its ordinary meaning. However, in the cases cited by the Fifth Circuit the courts' opinions have scrupulously and painstakingly justified an altered construction of the term.

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[13] The Act of June, 1872, Chapter 255 stated:

"Any final judgment or decree, in any civil suit or proceeding before a circuit court . . . may be reviewed and affirmed, reversed or modified by the Supreme Court, on writ of error or appeal. . . ." Section 693, Title XIII, Chapter II, 1873-74 Rev. Stat.

In *Russell v. National Mediation Board,* 764 F.2d 341 (5th Cir. 1985), *McDonald v. Schweiker,* 726 F.2d 311 (7th Cir. 1983), and *Schell v. Cochran,* 107 U.S. 624 (1883), the judgment debtor was the United States which is never required to post a supersedeas bond or pay a judgment until the appellate process is complete or abandoned by the government. Only the United States and its instrumentalities are accorded that privilege. The privilege has been conferred upon the sovereign by common law and by statute. 18 U.S.C. § 2408 (1982).

Construction of the term "final judgment" for purposes of *res judicata* or collateral estoppel as in 12 U.S.C. § 16(a) (1982) to mean a judgment after affirmance on appeal is consistent with, not contrary to, the common law. Generally, at common law a judgment could not be used as evidence or as a bar until all appeals had been exhausted. 2 Freeman on Judgments, § 722 (5th Ed. 1925). Cases construing 12 U.S.C. § 16(a) (1982) in consonance with common law are therefore not authority for construing 12 U.S.C. § 91 (1982) in derogation of common law.

Nor does the Fifth Circuit's opinion find support from *Clark v. Securities Industries Ass'n,* — U.S. —, 107 S. Ct. 750 (1987). In that case judicial precedent, industry usage and legislative history all supported this Court's construction of the term "branch" under the National Banking Act.

The Fifth Circuit's reliance on *Bradley v. Richmond School District,* 416 U.S. 696 (1974) is nothing less than farfetched. In *Bradley* this Court merely held that legislation authorizing recovery of attorneys' fees in school desegregation cases applied to an action on appeal when

the legislation became effective. This Court anchored its holding on the principle that "a court is to apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. Thus this Court held that the appellate court should have applied the law in force at the time of its decision. This Court's decision in *Bradley* simply has nothing to do with the construction of the term "final judgment" in Section 91.

VI.

THE PRELIMINARY INJUNCTION FRUSTRATES THE VERY PURPOSE OF SECTION 91 IN THAT IT ALLOWS CREDITORS OTHER THAN THESE PETITIONERS TO OBTAIN PREFERENTIAL PAYMENTS FROM THE BANK.

Ironically, 12 U.S.C. § 91 (1982), a statute designed as a shield to protect creditors from preferential payments made by a bank to selected creditors, has been used as a sword against these petitioners. The preliminary injunction permits all creditors other than these petitioners to be paid debts owed to them during the pendency of the state court appeal. The resulting preference of all other creditors over these petitioners is directly contrary to the purpose of Section 91 which was enacted to insure equality among creditors in the division of a bank's assets. *Pacific Nat'l Bank v. Mixter,* 124 U.S. 721, 727 (1888).

The appellants are now legitimate creditors of the bank. Judgments of a Texas trial court are presumed to be correct, regular and in compliance with the law. *Smith v. Texas Imp. Co.,* 570 S.W.2d 90 (Tex.Civ.App.—Dallas

1978, no writ); *Morin v. Morin*, 561 S.W.2d 263 (Tex.Civ. App.—Corpus Christi 1978, no writ); *T. J. Service Co. v. Major Energy Co., Inc.*, 552 S.W.2d 598 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.); *Dorfman v. Dorfman*, 457 S.W.2d 417 (Tex.Civ.App.—Texarkana 1970, no writ).

The events outlined in the statement of facts demonstrate that other creditors are currently being, and will be, preferred in payment over these creditors during the state court appeal.

The bank has argued that it is free to pay its depositors during the appeal from the state court judgment and has cited *McDonald v. Chemical National Bank*, 174 U.S. 610 (1899), *Rucker v. Kokrda*, 68 F.2d 73 (10th Cir. 1933) and *Nelson v. Lewis*, 73 F.2d 521 (2d Cir. 1934) for that principle. The holdings in those cases demonstrate that the preliminary injunction fails to preserve the status quo and permits the continuing diminution of the bank's assets during the appeal to Patton and LeMaire's obvious detriment.

Congress cannot have intended to prevent post judgment process to collect a judgment debt. To do so creates disparity in treatment between judgment creditors and other creditors of the bank and runs contrary to well-settled principles of common law recognized in *Omaha Hotel Co. v. Kountze*, 107 U.S. 377 (1882).

VII.

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO ENJOIN ENFORCEMENT OF A STATE COURT JUDGMENT.

The District Court acted as an appellate tribunal of a state court judgment contrary to the decisions of this Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Although MBank Abilene had the opportunity to petition for a writ of certiorari from the decision of the Texas Supreme Court denying its petition for a writ of mandamus to enjoin the collection of the judgment, it declined to do so.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), a losing state court litigant alleged in a federal lawsuit that a state court judgment violated its right to due process and equal protection, that it was the product of misapplied state law, and was entered by a biased state court. *Id.* at 415, 417. Affirming the district court's dismissal of the suit for want of jurisdiction, this Court declared: "If the constitutional questions stated in the [pleading] actually arose in the cause, it was the province and duty of the state courts to decide them." *Id.* at 415. If the state court decision was wrong, this Court continued, the remedy for constitutional error lay in "reversal or modification in an appropriate and timely appellate proceeding." *Id.* This Court explained that "no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character," for "[t]o do so would be an exercise of appellate jurisdiction" that district courts do not possess. *Id.* at 416.

This Court recently reaffirmed this principle in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). There plaintiff attorneys invoked Section 1983 to challenge decisions of the District of Columbia Court of Appeals denying them admission to the District bar. *Id.* at 470-73. The central issue for this Court —not present here—was whether the proceedings on the bar applications were "judicial in nature" so that review of the decisions by the district court would constitute an exercise of appellate powers over the equivalent of a state judicial determination. *Id.* at 476-79. Holding that the proceedings were "judicial in nature," this Court ruled that the district court lacked jurisdiction to review the orders denying admission. *Id.* at 486-87. This Court thus reaffirmed that a district court has no power to review a state judgment in the guise of adjudicating an ostensibly original claim under Section 1983. *Id.* According to this Court, "Review of [such judgments] may be had only in this Court." *Id.*

As was stated by MBank Abilene's counsel when appearing for Pennzoil before the Second Circuit in *Texaco v. Pennzoil:*

> A judgment that cannot legally be enforced is no judgment at all. By definition a judgment bestows rights on a party, rights "without which the judgment would have little or no value." *National Union Of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43 (1954). An order that denies the judgment creditor its rights in a judgment deprives the judgment of meaning, and does so as directly as an order vacating the judgment itself. To rule that a judgment entered by a trial court cannot be enforced is as much an exercise of appellate power as a declara-

tion that the judgment is void, reversed, vacated, or modified.[14]

By presuming that the judgment may not be affirmed, the Fifth Circuit has in effect reversed the state trial court judgment pending its affirmance on appeal. It has stripped Patton and LeMaire of their rights under the judgment and denied their present status as creditors of the bank.

CONCLUSION

The Fifth Circuit's construction of Section 91 in derogation of the common law is not justified by the legislative history of the act, is contrary to the express language of the statute and is contrary to this Court's decisions in *Pierson v. Ray,* and *Third National Bank v. Impac Limited, Inc.* The lower courts' construction of the term "final judgment" is contrary to its ordinary meaning and its usage by Congress. The lower courts have granted a privilege to national banks heretofore reserved only for the sovereign which is unjustified by any language in the statute. The result of the preliminary injunction is a drastic alteration of the status quo, is contrary to the very purpose for which the statute was enacted and has grievously injured these petitioners.

[14] Brief for Appellant Pennzoil Company, at 21, Cause No. 86-7046, 7052; In the United States Court of Appeals for the Second Circuit.

PRAYER

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

CLAYCOMBE & KING
2424 Allianz Financial Centre
2323 Bryan Street, LB 159
Dallas, Texas 75201
(214) 220-2424

By: BRUCE W. CLAYCOMBE
Counsel of Record

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1761

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARRY LEMAIRE and Estate of RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG,

Defendants-Appellants,

versus

MBANK ABILENE, N.A.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 9, 5 Cir., 1987, — F.2d —)

(October 9, 1987)

Before POLITZ, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(√) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX B

UNITED STATES of America,

Plaintiff-Appellee,

v.

Harry LEMAIRE, Estate of Richard Patton, Hilmar R. Zeissig, Bert F. Scales, and Dieter J. Scherfenberg, Defendants-Appellants,

v.

MBANK ABILENE, N.A.,

Defendant-Appellee.

No. 86-1761.

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1987.

The United States, on behalf of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, filed action, seeking injunction prohibiting execution of state court judgment against bank during pendency of the state court appeal. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., granted requested relief. Appeal was taken. The Court of Appeals, Politz, Circuit Judge, held that "final judgment," within meaning of statute proscribing attachment, injunction, or execution against any national bank before final judgment in any suit in state court, meant judgment on the merits which is no longer subject to examination on appeal.

Affirmed.

Banks and Banking 278, 279

"Final judgment," within meaning of statute which proscribes attachment, injunction, or execution against any national bank before final judgment in any suit in state court, means judgment on the merits which is no longer subject to examination on appeal; therefore, judgment against bank could not be executed during pendency of the state court appeal. National Bank Act, 12 U.S.C.A. § 91.

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

This appeal requires us to define the term "final judgment" as used in 12 U.S.C. § 91, which proscribes "attachment, injunction or execution" against a national bank "before final judgment in any suit" in state court. We agree with the trial court's interpretation and affirm.

Background

The genesis of the present proceeding is a state court suit by Harry Lemaire and the other appellants against MBank Abilene, formerly Abilene National Bank, alleging breach of contract, fraud, and tortious interference with

contract. At the conclusion of an extended trial the jury awarded appellants sixty-nine million dollars.

MBank appealed the adverse judgment to the Texas Court of Appeals, but did not post a supersedeas bond. The trial court first stayed enforcement of the judgment pending exhaustion of all rights of appeal, but then vacated that order. MBank petitioned the Court of Appeals and the Supreme Court of Texas for a writ of mandamus directing the trial court to give effect to 12 U.S.C. § 91 and thereby preclude execution of the judgment pending the appeal. When the state appellate courts declined to consider those petitions, appellants caused writs of garnishment to be served on, *inter alia*, the Federal Reserve Bank in Dallas, which stopped clearance of MBank checks and threatened its insolvency. In response to this development the United States, on behalf of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency,[1] filed the instant suit in federal district court, invoking 12 U.S.C. § 91 as the basis for a temporary restraining order and preliminary injunction prohibiting appellants from executing on the state court judgment during the pendency of the state court appeal. The district court granted the requested relief and this appeal followed.

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1. The interest of the United States stems from the fact that the FDIC holds a fifty-million-dollar certificate of deposit on MBank Abilene and is liable for over one hundred sixty-eight million dollars of insured MBank deposits. Further, the Comptroller of the Currency exercises extensive control over all activities, including dissolution, of national banks under the National Bank Act, 12 U.S.C. § 38 (codified as detailed in the "References in text" thereto).

Analysis

As noted, the sole issue posited by this appeal is the meaning of the term final judgment in 12 U.S.C. § 91, which prescribes in pertinent part that

> no attachment, injunction, or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellants insist that the garnishment they caused to issue was not inconsistent with this congressional mandate because the state trial court had entered a final judgment. The district court was not persuaded and concluded that final judgment within the intendment of 12 U.S.C. § 91 means a judgment from which no appeal can be taken. The district court found that the garnishment violated 12 U.S.C. § 91 and enjoined any action by appellants to enforce the state court judgment pending its review on appeal.[2]

The issue faced by the district court, and now by this court, is *res nova*. Although the Supreme Court has re-

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2. The Anti-Injunction Act, 28 U.S.C. § 2283, prohibiting a federal court from enjoining state court proceedings, is not applicable. The Act does not prevent the United States, or one of its agencies, from acting to protect a federal interest. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971). Moreover, the Act does not apply to injunctions "expressly authorized by Congress," including injunctions necessary to protect a right created by Congress. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

viewed the text of 12 U.S.C. § 91 on four occasions,[3] it has not considered the final judgment inquiry now presented. Nor has any federal appellate court.[4]

It is axiomatic that the meaning of final judgment varies according to context. Appellants urge that we simply accord the meaning ascribed when appealability itself is at issue, namely a judgment on the merits by the trial court. *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b). To do so would be overly facile and would oblige us to ignore those instances wherein the term has been recognized as meaning a judgment after all appeals have been exhausted. That is the definition given to it by this court and our colleagues in the Seventh Circuit in construing the Equal Access to Justice Act, 28 U.S.C. § 2412(d). *Russell v. National Mediation Board*, 764 F.2d 341 (5th Cir. 1985), *withdrawn on other grounds*, 775 F.2d 1284 (1985); *McDonald v. Schweiker*, 726 F.2d 311 (7th Cir.1983). The same definition has been accorded in the Suits in Admiralty Act, 46 U.S.C. §§ 741, 748, and the Clayton Act, 15 U.S.C. § 16(a); *see McDonald; Illinois v. Sperry Rand Corp.*, 237 F.Supp. 520 (N.D.Ill.1965).

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3. *See Pacific National Bank v. Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Earle v. Pennsylvania*, 178 U.S. 449, 20 S.Ct. 915, 44 L.Ed. 1146 (1900); *Van Reed v. People's National Bank*, 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); and *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 97 S.Ct. 2307, 53 L.Ed.2d 368 (1977).

4. We find only one state appellate decision, *Loew's Incorporated v. Superior Court of the State of California*, 301 P.2d 64 (Cal.Ct.App. 1956), which defined final judgment as a judgment "from which no appeal can be taken." *Id.* at 72. The opinion was later withdrawn from official publication by the California Supreme Court. No reason was given for this withdrawal.

In 1883, not long after the language we consider today was added to our statutory treasury,[5] final judgment in a statute governing the execution of judgments against a revenue officer was taken to mean a judgment after affirmance on appeal. 28 U.S.C. § 2006 (Act Mar. 3, 1863, c. 76, § 12, 12 Stat. 741 (later R.S. 989)); *Schell v. Cochran*, 107 U.S. (17 Otto) 625, 27 L.Ed. 543 (1883). Finally, we observe that in at least one instance not requiring statutory interpretation, the Supreme Cort has given the term the judgment-after-appeal connotation. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 n. 14, 94 S.Ct. 2006, 2016 n. 14, 40 L.Ed.2d 476 (1974) (discussing collateral attack of a final judgment for purposes of retroactive application of a statute).

Appellants urge us to adopt what it advances as the Texas definition of final judgment: a judgment on the merits by the trial court.[6] We decline their invitation, for although a Texas state court judgment is involved it is a federal statute that we interpret. We are convinced that Congress intended that a federal definition of final judgment be applied to the terms and conditions of the National Bank Act. We are buttressed in this conclusion by a recent decision of the Supreme Court implicitly holding that a federal definition is to be given to words used in the National Bank Act. *Clarke v. Securities Industry Ass'n*, — U.S. —, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) ("branch," 12

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5. Revised Statutes of 1873-74, Title LXII, Ch. 4 § 5242, Act Mar. 3, 1873, c. 269, § 2, 17 Stat. 603.

6. *But see Renger v. Jeffrey*, 143 Tex. 73, 182 S.W.2d 701, 702 (1944) (distinguishing "final judgment" from "judgment before it comes final and while an appeal is pending" for purposes of Texas Rules of Civil Procedure 364, 368, and 385).

U.S.C. § § 36, 81). We have explicitly so held. *Department of Banking v. Clarke,* 809 F.2d 266 (5th Cir.), *cert. denied,* — U.S. —, 107 S.Ct. 3240, 97 L.Ed. 2d 745 (1987) ("state bank," 12 U.S.C. § 36). *Cf. Interfirst Bank Abilene v. FDIC,* 777 F.2d 1092 (5th Cir.1985) (allowance of claims against insolvent national bank is a matter of federal law).

We draw our final guidance from an analysis of the purpose of the statutory language now found in the last portion of 12 U.S.C. § 91. Although the legislative history is scant, the discussion in the Supreme Court decisions involving the statute is instructive.

The National Currncy Act, now the National Bank Act, was enacted in 1864 to provide for the formation and regulation of national banks. The prohibition which is the critical language before us today was added in 1873, a year of financial panic and widespread bank closings. That language was added to the section of the National Bank Act relating to preferential transfers and to acts in contemplation of involvency.[7] In its first discussion of the

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7. 12 U.S.C. § 91 in its entirety reads:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments of decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

subject legislation in *Pacific National Bank v. Mixter*, 124 U.S. 721, 726, 8 S.Ct. 718, 720, 31 L.Ed. 567 (1888), the Supreme Court opined that what is now 12 U.S.C. § 91 "was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank." The court later added that the provision sought to "prevent such banks from creating preferences in contemplation of their failure." *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 55, 57 S.Ct. 81, 83, 81 L.Ed. 33 (1936).

Our reading of the statute, and the early discussions of it by the Supreme Court, lead us to conclude that the provision was added to the preferential transfer section of the National Bank Act to prevent creditors from obtaining preferential treatment by court action, including the securing of a judgment at the trial court level.

The decision in *Earle v. Pennsylvania*, 178 U.S. 449, 20 S.Ct. 915, 44 L.Ed. 1146 (1900), adds little to our quest for it dealt only with an attachment against the bank as holder of a thing of value for another. But in its next encounter, *Van Reed v. People's National Bank*, 198 U.S. 554, 557, 25 S.Ct. 775, 776, 49 L.Ed. 1161 (1904), the Court recognized that:

> National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character . . . and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit.

Finally, in its most recent consideration of § 91, the Court footnoted and quoted with approval from an early decision by the Supreme Court of Georgia to the effect that the policy behind the legislation was to prevent prefer-

ence or priority of claims against national banks by seizure under state authority before final adjudication of claims, and to protect the banks from the crippling effects of such seizures. *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n. 13, 97 S.Ct. 2307, 2313 n. 13, 53 L.Ed.2d 368 (1977) (*quoting Planters Loan & Sav. Bank v. Berry*, 91 Ga. 264, 265, 18 S.E. 137 (1893)).

Congress has entrusted the superintendence of national banks to the Comptroller of the Currency, 12 U.S.C. § 1 *et seq.* Amongst the Comptroller's duties is the obligation to assure the continued viability of national banks where possible, and the orderly and fair liquidation of any national bank which falls into insolvency. The Comptroller is to protect the interests of the United States, direct and indirect, general and specific, and is to secure an equitable distribution of bank assets to the creditors of a failed bank.

Quick and vigorous action to prevent the premature, and potentially fatal, seizure of assets of an operational bank, an eye cautiously cocked to the financial interest of the government as a creditor of any "embarrassed" institution and as guarantor of its depositors, and the securing of substantial assets essential to a fair and equitable dispersal to creditors of a failed bank, are all important functions of the Comptroller. All are in the national interest as addressed by the Congress. We are persuaded that Congress intended to and did arm the Comptroller with the lorica of an absolute proscription against the seizure of the property of a national bank before a judgment against that institution had completed the appellate process.

For the foregoing reasons, we conclude and hold that the term "final judgment" as used in 12 U.S.C. § 91 means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review.

The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	
	)	CIVIL ACTION
VS.	)	NO. 1-86-143-K
	)	
MBANK ABILENE, N.A., HARRY LEMAIRE, RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG	)	(Filed October 24, 1986)

MEMORANDUM OPINION

On August 12, 1986, a $69,000,000.00 judgment was entered against MBank Abilene in the state court case of *Harry LeMaire, et al. v. MBank Abilene, N.A.*, Judgment was entered in the favor of LeMaire, Patton, Zeissig, Scales and Scherfenberg. On that same day, the trial court entered an order granting MBank's Motion to stay enforcement of the $69,000,000.00 judgment pending exhaustion of all rights of appeal. On September 2, 1986, the trial court withdrew its order. MBank subsequently petitioned both the Texas Court of Appeals and the Texas Supreme Court seeking a writ of Mandamus directing the trial court to give effect to 12 U.S.C. § 91.[1] Both courts

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1. Section 91 of Title 12 of the United States Code reads in part: ". . . [N]o attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court."

refused to hear the petitions. On September 18, 1986 the trial court denied MBank's motion for a new trial. On that same day, plaintiffs LeMaire, Patton, Zeissig, Scales and Scherfenberg caused writs of garnishment to be issued and served on MBank Dallas, MBank Fort Worth, the Federal Reserve Bank of Dallas and Anbore, Inc., a subsidiary of Mbank Abilene.

On September 22, 1986 the United States of America filed a complaint with this Court seeking a temporary restraining order and a preliminary injunction against LeMaire, Patton, Zeissig, Scales and Scherfenberg's execution of the state court judgment and attachments or garnishments resulting in connection therewith. On that day, this Court entered a Temporary Restraining Order. The Temporary Restraining Order has twice been extended. On October 16, 1986, the Court heard oral arguments on the United States of America's Motion for Injunctive and Declaratory Relief. The Court makes the following findings:

I. JURISDICTION

This Court finds that it is properly exercising jurisdiction over this case. Under 28 U.S.C. § 1345, the district court has jurisdiction over all cases in which the United States of America is a plaintiff. This is such a case.

Defendants LeMaire, Patton, Zeissing, Scales and Scherfenberg have filed motions to dismiss, alleging *inter alia* that the Court lacks *in personam* jurisdiction over them. Before the Court may issue preliminary injunction against the Defendants, it must have both subject matter and personal jurisdiction over them. *Enterprise Intern. v. Corporation Estatal Petrolera,* 762 F.2d 464, 470 (1985). The

Court finds that it has *in personam* jurisdiction over these Defendants. Process was personally served upon these Defendants on September 29, 1986. On September 23, 1986, the Court received notice that Richard Patton, one of the defendants, had died. Nan Patton, his wife, has been substituted into the case.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg also allege that this Court lacks subject matter jurisdiction over the controversy. Defendants allege that the United States of America lacks standing to pursue this claim. Defendants' Motion to Dismiss, etc. at 2.

The United States Supreme Court has recognized that the United States has standing to prevent interference with its powers and functions. In *In re Debs*, 158 U.S. 564 (1895), the Court stated:

> Every government, entrusted . . . with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

Id. at 584.

Congress was given the power to establish national banks under the constitutional provision relating to borrowing and coining money. U.S.Const.Art. I, § 8, Cl. 2 and 5; *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). In 1864, the Congress passed the National Currency Act and thereby established a "complete system" for regulation

of national banks. *Dietrick v. Greaney,* 309 U.S. 190, 194 (1940). The National Bank Act was amended in 1873 to prohibit the attachment, injunction or execution against a national bank before final judgment in any state, county or municipal court. 12 U.S.C. § 91. This section is at the heart of this controversy and therefore, the United States of America has standing to represent the interests of the federal government in the proper implementation and enforcement of Section 91.

In addition to the United States of America's general interest in ensuring that federal laws are implemented, the United States of America has more particularized interests at stake by virtue of two federal instrumentalities. The National Currency Act established the Office of the Comptroller of the Currency (OCC) within the Department of Treasury. 12 U.S.C. § 1. The OCC's duties involve the regulation and supervision of national banks. 12 U.S.C. § 1. MBank Abilene, N.A. is a national banking association and as such falls within the purview of the OCC. Parties' Stipulations at 2. Therefore, the OCC has a particularized interest in this Court's construction of 12 U.S.C. § 91.

A second federal instrumentality having a stake in the outcome of this suit is the Federal Deposit Insurance Corporation (FDIC). The FDIC insures the accounts of qualified depositors up to $100,000.00 12 U.S.C. § 1821. MBank Abilene has approximately $168,800,000.00 of insured deposits at its bank. Stone Affidavit at 3. If MBank Abilene is rendered insolvent, the FDIC will be obligated to repay a substantial portion of this amount. Therefore, it is clear that the FDIC has a very substantial stake in the outcome of this case. Accordingly, this Court finds that the United States of America is a proper party to this ac-

tion. It has standing to seek injunctive and declaratory relief from this Court. U.S.C. § 91 precludes attachment of assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

II. VENUE

Defendants allege that venue is improper in this district and accordingly urge that this matter be dismissed. LeMaire-Patton's Motion to Dismiss, etc. at 3; Zeissig-Scales-Scherfenberg's Motion to Dismiss, etc. at 5. Under 28 U.S.C. § 1391(b), venue in this action is proper in the judicial district where all the defendants reside or in which the claim arose. All the Defendants do not reside in one district.[2] Therefore, for this court to have proper venue over this action, the claim must have arisen in the Northern District of Texas. In determining where a claim arose, the Court should consider "events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." *Lamont v. Haig,* 590 F.2d 1124, 1134 (D.C. Cir. 1978). Courts have upheld a plaintiff's choice of venue in a district where some injury to the plaintiff occurred or where the effects of the defendant's conduct was felt. *See Murphy v. Allen County Claims & Adjustments, Inc.,* 550

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2. Defendant MBank Abilene has its principal offices and place of business in Taylor County in the Northern District of Texas. Defendants LeMaire and Zeissig reside in Fort Bend County in the Southern District of Texas. Defendants Scales and Scherfenberg reside in Harris County in the Southern District of Texas. Defendant Nan Patton resides in Bexar County in the Western District of Texas. Plaintiff's Proposed Findings of Fact and Conclusions of Law at 2.

F.Supp. 128, 131 (S.D. Ohio 1982); *Sanchez v. Pingree,* 494 F.Supp. 68, 70 (S.D. Fla. 1980); *Sheffield v State of Texas,* 411 F.Supp. 709, 713 (N.D. Tex. 1976).

Plaintiff United States of America has filed an action for declaratory and injunctive relief in this district—the Northern District of Texas. The preceding state court action was held in the Southern District of Texas. However, this present suit concerns the effects of that state court action on Defendant MBank Abilene. MBank Abilene is a resident of the Northern District of Texas. If the writs of attachment and garnishment are upheld in this action, the effects of those actions upon the Bank, its creditors, its depositors and the public will be felt most directly in this district. Therefore, following the *Sheffield* decision, the suit can be brought in the Northern District of Texas because venue is proper here.

III. DECLARATORY JUDGMENT

The United States of America seeks a declaratory judgment "declaring that 12 U.S.C. § 91 precludes attachment of the assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies." Complaint for Declaratory and Injunctive Relief at 6.

In construing 12 U.S.C. § 91, this Court must begin with the statutory language itself. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979). The Court is required "to give effect, if possible, to every word Congress used." *Id.* at 339 (*citing United States v. Menasche,* 348 U.S. 528, 538-39 (1955)). In attempting to glean Congress' intent from the statute, the Court is required to consider the context,

the purposes of the law, the circumstances under which the words were used, as well as the words themselves. *District of Columbia v. Carter,* 409 U.S. 418, 420 (1973).

The portion of 12 U.S.C. § 91 which the United States of America alleges is applicable to this action reads:

> ". . . [N]o attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

This provision of 12 U.S.C. § 91 was enacted in 1873. (Revised Statutes of 1873-74, Title LXII, Ch. 4 § 5242). This provision was added to Section 5242 (§ 91) which had previously dealt only with preferential transfers.

To date, the United States Supreme Court has considered 12 U.S.C. § 91 only four times. In *Pacific National Bank v. Mixter,* 124 U.S. 721 (1887), the Court was faced with the question of "whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States." *Id.* at 724. The Court concluded that no attachment could issue against a national bank before judgment in a state or federal suit. *Id.* at 727.

The next time the Supreme Court studied 12 U.S.C. § 91 was in *Earle v. Pennsylvania,* 178 U.S. 449 (1900). In that case, the Court held that "an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section." *Id.* at 454. Because garnishment of a depositor's property, not the bank's property, was sought in the *Earle* case, it does not control the instant case.

In *Van Reed v. Peoples' National Bank,* 198 U.S. 554 (1905) the Court interpreted 12 U.S.C. § 91 for a third time. The Court affirmed the *Mixter* Court's interpretation of 12 U.S.C. §91 as applying "to all conditions of national banks, whether solvent or insolvent." *Id.* at 559.

In 1977, the Supreme Court agan consdiered the meaning of 12 U.S.C. § 91 in *Third National Bank v. Impac Limited, Inc.,* 432 U.S. 312 (1977). The question presented in that case was "whether that prohibition [of 12 U.S.C. 91] applies to a preliminary injunction restraining a national bank from holding a private foreclosure sale, pending adjudication of the mortgagor's claim that the loan is not in default." *Id.* at 313. The Court concluded that 12 U.S.C. § 91 did not apply to "an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure." *Id.* at 324. Rather, the Court interpreted 12 U.S.C. § 91 to prevent the "prejudgment seizure of bank property by creditors of the bank." *Id.*

In the instant case, the United States of America seeks a prohibitory injunction after a complete state court trial on the merits. None of the Supreme Court decisions discussed above address the precise question raised here, that is the meaning of the term "final judgment" as contained in 12 U.S.C. § 91. The United States of America contends that final judgment is one from which no further appeal can be taken. Defendants LeMaire, Patton, Scales, Zeissig and Scherfenberg contend that final judgment is one from which an appeal can be taken. To date, the Supreme Court has not defined "final judgment" in the context of 12 U.S.C. § 91. It is therefore this Court's responsibility to interpret the meaning of "final judgment" within the context of Section 91.

The Supreme Court has noted that Section 5242 (now 12 U.S.C. § 91) was deliberately placed at the end of the preferential transfer section of the Banking chapter. *Mixter* at 726; *Earle* at 453; *Impac* at 322-24. The *Mixter* court found Congress' intent to be to assure equality among general bank creditors in the division of bank assets upon insolvency. *Mixter* at 727. The Supreme Court's reading of 12 U.S.C. § 91 is bolstered by the fact that 1873, the year of the amendment, was the year of a financial crisis. The Court took judicial notice of this fact when it rendered its *Impac* decision. *Impac* at 317. It appears clear that Congres intended 12 U.S.C. § 91 to prohibit premature attachment of bank assets by one of its creditors.

It is clear that the Congressional intent behind 12 U.S.C. § 91 was to ensure equality among the creditors in the distribution of bank assets upon insolvency. A finding that "final judgment" means one from which no further appeal can be taken would promote the settled Congressional intent. If a creditor were permitted to attach bank assets before final and dispositive resolution of his state court claim, he would be effecting a preference. Preferential transfers of an insolvent bank are clearly prohibited by 12 U.S.C. § 91. Defendants' reading of 12 U.S.C. § 91 could cause havoc. Under the Defendants' interpretation of the sattute, a creditor would be entitled to attach banks assets after a trial court judgment has been rendered but while an appeal is pending. This procedure is problematic. If an appellate court subsequently overturns or modifies the original state court judgment, the bank might have little recourse in regaining its assets. Such a reading and application as Defendants could force a national bank into pre-

mature insolvency. If MBank Abilene is required to pay off its $69,000,000.00 judgment now, it could become insolvent. Stone deposition at 49; Herrmann deposition at 29, 58. A subsequent reversal or modification of that judgment by a Texas appellate court may be of little avail. The bank may already be insolvent and the bank's depositors and creditors will yield to a preference accorded to LeMaire, Patton, Zeissig, Scales and Scherfenberg. The prevention of such an inequitable distribution of the bank's assets was precisely the Congressional intent behind 12 U.S.C. § 91.

To date, there is only one case dealing with this precise issue—*Loews' Incorporated v. Superior Court of the State of California,* 301 P.2d 64 (Cal. 1956). In that case, the Court interpreted "final judgment" to mean a judgment "from which no appeal can be taken." *Id.* at 72. The California court relied on the generally accepted meaning of the word "execution" in making its decision. The court noted that "a writ of execution 'is part of the remedy to effectuate the action by the enforcement of the judgment.'" *Id.* (*citing United States v. Nourse,* 34 U.S. 8, 27 (1835)). Because an execution "gives the successful party the fruits of his judgment," the court reasoned that final judgments must mean those from which no appeal can be taken. *Id.* at 72.

This Court is persuaded that the *Loews* court's interpretation of "final judgment" in 12 U.S.C. § 91 is a correct one. Such an interpretation furthers the Congressional purpose in enacting 12 U.S.C. § 91—that of assuring ratable distribution of assets between all creditors of the now insolvent bank.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg contend that even if the *Loews* decision applies

here, MBank Abilene has waived the benefits of 12 U.S.C. § 91. In *Loews,* the California court recognized that a bank could waive its advantage under 12 U.S.C. § 91. *Loews* at 72. In that case, a national bank undertook a foreclosure as authorized by state statute. The California court found that the bank had selectively used the state statute. *Id.* The court accordingly held that the national bank had waived its advantage under 12 U.S.C. § 91. *Id.* Defendants here assert that MBank Abilene has waived the benefits of 12 U.S.C. § 91. The United States of America is the plaintiff in the instant case; it is seeking to enforce 12 U.S.C. § 91. The United States of America was *not* a party to the state court action and has not sought the protections of any state statute, as did the plaintiff in the *Loews* case. Its only involvement is in filing its complaint for declaratory and injunctive relief to commence suit in this Court. Therefore, the United States of America did not waive any of the benefits it derives under 12 U.S.C. § 91.

In conclusion, the Court finds that given the Congressional intent behind enactment of 12 U.S.C. § 91, the plain meaning of the words themselves and the context of the words "final judgment", the words "final judgment" must be interpreted to mean a judgment from which no appeal can be taken. Accordingly, this Court will grant Plaintiff's requested declaratory relief. This Court finds that 12 U.S.C. § 91 precludes attachment of assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

IV. PRELIMINARY INJUNCTION

In order for a preliminary injunction to issue, the movant must prove four things:

> "(1) a substantial likelihood of success on the merits;
>
> (2) a substantial threat of irreparable injury if the injunction is not issued;
>
> (3) that the threatened injury to the movant outweighs any danger the injunction might cause to the opponent; and
>
> (4) that the injunction will not disserve the public interest."

Enterprise Intern. at 472 (*citing Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984)).

The United States of America must prove that it is substantially likely to succeed on the merits. For the United States of America to prevail, it must prove that 12 U.S.C. § 91 prohibits the execution of a judgment against a national bank until all state court appeals have been taken. The Court is convinced that such a reading of 12 U.S.C. § 91 is correct. For all the reasons set forth above, the Court finds that the United States of America would likely prevail.

Second, the United States of America must demonstrate that there is a substantial threat of irreparable injury if the injunction is not issued. Irreparable injury has been defined to mean "injury that cannot be undone through monetary remedies." *Enterprise Intern.* at 472 (*citing Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981)). If no injunction was issued, MBank Abilene would be required to pay off its $69,000,000.00

judgment immediatedly. The United States of America has introduced evidence that MBank Abilene lacks sufficient funds from which to pay the judgment. Herrmann deposition at 29. It is therefore probable that MBank Abilene may become insolvent. Stone deposition at 49; Herrmann deposition at 29, 53. If MBank Abilene becomes insolvent, the United States of America will suffer irreparable injury.

The Federal Deposit Insurance Company (FDIC) would suffer irreparable injury. By law, the FDIC is required to insure each depositor in a national bank such as MBank Abilene up to $100,000.00. 28 U.S.C. § 1821. MBank Abilene has approximately $168,800,000.00 of insured deposits at its bank which the FDIC would be obligated to repay upon insolvency. Stone Affidavit at 3; Stone deposition at 58. The FDIC also has a $50,000,000.00 Certificate of Deposit on file with MBank Abilene. Only $100,000.00 of that amount is insured so the FDIC would be unsecured for the remaining $49,900,000.00. If MBank Abilene is rendered insolvent, the FDIC will be the largest unsecured creditor of MBank Abilene with a total indebtedness of $218,700,000.00. Stone Affidavit at 3. It is clear that a premature execution of judgment and consequent bank insolvency will harm the MBank Abilene's depositors. It will also affect the community at large. Stone deposition at 48. The public will lose confidence in the national banking system. The FDIC will also lose "substantial unrecoverable administrative expenses in connection with an unwarranted liquidation." Stone Affidavit at 4. The FDIC's injury would be irreparable—its harm could not be undone through monetary remedies. In the event *Le-*

Maire, et al's state court judgment is overturned or modified, the large amount of money expended to pay off secured depositors might not be repaid to the FDIC. No amount of money could restore the public's confidence in MBank Abilene. Also, no amount of money could rebuild MBank Abilene into the viable financial institution it presently is. As a practical matter, it would be impossible to reconstitute and reopen the bank. The Court finds that the FDIC will be irreparably harmed if the injunction does not issue.

The Office of the Comptroller of the Currency (OCC) likewise will suffer an irreparable injury if the injunction does not issue. The OCC has the statutory responsibility to see that federal banking laws are given full effect. Herrmann Affidavit at 2. If 12 U.S.C. § 91 is not read to prohibit execution of judgment before all appeals of the state court judgment have been exhausted, then the OCC will have failed in its duties. If 12 U.S.C. § 91 is not given the above reading, creditor and depositor confidence in the national banking system will be eroded. Herrmann Affidavit at 2-3. This loss of confidence is especially troublesome today in the face of adverse economic conditions and troubled banks. Hermann Affidavit at 2-3. The OCC's inability "to effectively administer the federal banking statutes for the protection of MBank Abilene's creditors and depositors, as well as for the welfare of the general banking public" would constitute irreparable injury. Herrmann Affidavit at 3. No amount of money could restore the public's confidence in the federal banking system. The Court is satisfied that the OCC will suffer irreparable harm if the injunction is not issued.

Third, the United States of America must prove its threatened injury outweighs any danger the injunction might cause to the Defendants. If the injunction does not issue, the United States of America will be injured by the possible insolvency of one of its national banks and its resulting monetary liability to depositors. As recited above, if MBank Abilene is required to pay off Defendants' $69,000,000.00 judgment immediately, it may become insolvent. If no financial institution can be found to assume MBank Abilene's liabilities, the FDIC will be liable for approximately $218,700,000.00. Stone Affidavit at 3; Stone deposition at 58.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg contend that they are entitled to recover their $69,000,000.00 judgment now. They allege that after all appeals have been taken in the state court action, MBank Abilene will have no money left from which to pay their state court judgment. A balancing of the Defendants' potentional inability to collect their judgment with MBank Abilene's probable dissolution with enormous resulting hardship on the United States of America clearly weighs more heavily in the Government's favor. Therefore, the Court finds that the United States of America's threatened injury outweighs any potential dangers suffered by Defendants.

Fourth, the United States of America must prove that issuance of an injunction will not disserve the public interest. If the injunction is issued, MBank Abilene will probably continue its normal business operations, thus serving its depositors, creditors and the public at large. Stone deposition at 48. If the injunction is not issued, the

Defendants would immediately seek execution of their writs of garnishment on MBank Dallas, MBank Fort Worth, Federal Reserve Bank in Dallas and Anbore, Inc. Upon execution of these writs, MBank Abilene would probably become insolvent. Herrmann deposition at 29. Such insolvency would disserve the public. In the past three years, a large number of banks have become insolvent. Stone deposition at 29-30. Already this year 109 banks have failed. Stone deposition at 30. The insolvency and failure of MBank Abilene would cause the public to lose further confidence in the banking system. Herrmann deposition at 36; Stone deposition at 48. Loss of confidence in one of the United States' most fundamental institutions would certainly disserve public interest. By granting the preliminary injunction, the Court is serving the public interest; it is protecting the bank's depositors, creditors, as well as the public at large from the premature insolvency of one of its national banks.

After analysis of the four preceding factors, the Court finds that the United States of America has proved the requisite elements for a preliminary injunction.

V. CONCLUSION

Based upon the foregoing discussion, the Court finds that the United States of America's petition for declaratory and injunctive relief is well-taken. This Court finds that 12 U.S.C. § 91 precludes the execution of the state court judgment directed to Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

The Court also orders injunctive relief enjoining Defendants LeMaire, Patton, Scales, Zeissig and Scherfenberg's execution of the state court judgment and attachments or garnishments resulting in connection therewith.

An order will be entered in conformance with this memorandum opinion.

IT IS SO ORDERED.

SIGNED this 24 day of October, 1986.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	
	)	CIVIL ACTION
VS.	)	NO. 1-86-143-K
MBANK ABILENE, N.A., HARRY LEMAIRE, RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG	)	(Filed October 24, 1986)

PRELIMINARY INJUNCTION

For the reasons stated in the accompanying Memorandum Opinion of same date, the Court finds that the United States of America's petition for declaratory and injunctive relief should be GRANTED.

It is therefore ORDERED, ADJUDGED and DECREED that during the pendency of this Injunction, Defendants Harry LeMaire, Nan Patton, Hilmar Zeissig, Bert Scales and Dieter Scherfenberg, including their attorneys, are enjoined from further enforcing or further seeking to enforce any writs of attachment, writs of garnishment or executions upon a judgment sought, filed or entered in connection with the above-referenced state proceeding *LeMaire v. MBank Abilene, N.A.*, including attempts at enforcement by seeking to hold third parties or MBank Abilene in contempt of state court orders as long as this Injunction is in effect.

It is further ORDERED that MBank Abilene, N.A. shall cause a copy of its daily responsibility trial balance sheet to be delivered to the Court and to counsel for other Defendants by 5:00 o'clock P.M. of the same date such balance sheets are made available to MBank Abilene, N.A. Such documents filed with the Court shall be filed under seal and shall not be provided to any person or entity not a party to this action without order of this Court. The documents provided to counsel for the remaining Defendants shall be kept confidential, shall not be disclosed other than to parties or their attorneys in this cause and shall not be used for any purpose other than for use in this litigation.

IT IS SO ORDERED.

SIGNED this 24 day of October, 1986.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,
Petitioners,

v.

UNITED STATES OF AMERICA AND MBANK ABILENE, N.A.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MBANK ABILENE, N.A.

Of Counsel:

BAKER & BOTTS
Houston, Texas

W. MIKE BAGGETT
WINSTEAD, MCGUIRE, SECHREST & MINICK
1700 Dallas Building
Dallas, Texas 75201
(214) 742-1700

JOSEPH D. CHEAVENS
BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002
(713) 229-1250

Attorney for Respondent MBank Abilene, N.A.

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STATEMENT OF THE CASE

A. State Court Proceedings.

In August 1986, Petitioners and three other individuals obtained a Texas state court judgment ("the Judgment") of approximately $69.4 million against Respondent MBank Abilene, N.A. ("MBank"). The Judgment was based on claims that MBank refused to fund an alleged oral commitment made by its prior management to lend $3 million to finance drilling operations of an oil and gas company owned by the state court plaintiffs. The former management of the bank, then called Abilene National Bank ("ANB"), first refused to loan money to the company after the bank came under investigation by federal regulatory authorities. The investigation ultimately led federal authorities to remove that management in mid-1982. Mercantile Texas Corporation, the predecessor of MCorp which now owns MBank, assumed ownership of ANB with the assistance of the Federal Deposit Insurance Corporation ("FDIC") and the Office of Comptroller of the Currency ("OCC"). In compliance with federal law, the new MBank management continued to refuse to loan money to Petitioners' company.

In 1984, MBank instituted foreclosure proceedings against Petitioners on personal debts that were in default. Petitioners then filed the state court action, initially seeking to restrain the foreclosure and later seeking damages. That suit ultimately led to the 1986 Judgment against MBank. Upon entry of the Judgment, MBank filed a motion to stay its enforcement pursuant to 12 U.S.C. § 91, which in pertinent part provides:

> [N]o attachment, injunction, or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court.

12 U.S.C. § 91 (1982) ("Section 91"). Because MBank maintained equity capital of only $17 million, it could not post the supersedeas bond required by Texas law to stay the execution of the Judgment. The state district court first entered an order granting a stay but withdrew that order on Petitioners' motion. MBank filed Motions for Leave to File Petitions for Writs of Mandamus with the Texas Fourteenth Court of Appeals and the Texas Supreme Court, both of which denied the motions without opinion and without reaching the merits.

On September 18, 1986, the state trial court entered an order denying MBank's Motion for New Trial.[1] On that same date, Petitioners began efforts to enforce the Judgment by securing writs of garnishment, naming as garnishees the Federal Reserve Bank of Dallas, MBank Dallas, N.A., MBank Fort Worth, N.A., and Anbore, Inc. The writs were served on the garnishees the next day. The service of these writs threatened MBank's continued operation. Checks presented for clearance through the payment system at the Federal Reserve Bank of Dallas were not honored, creating a severe imbalance in MBank's accounts and imminent insolvency. *See* September 19, 1986 affidavit of Robert J. Herrman, Senior Deputy

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1. Denial of the Motion for New Trial triggered the appellate process under Texas law. MBank's state court appeal on the merits is pending before the Texas Fourteenth Court of Appeals. MBank filed its brief on August 12, 1987. Petitioners obtained extensions of the normal 30-day period in which to reply, and their briefs were filed during the week of February 1, 1988.

Comptroller for Bank Supervision at the Office of the Comptroller of the Currency, ¶ 10.

B. Federal District Court Proceedings.

The following Monday morning, before the Bank opened for business, the United States filed suit in the United States District Court for the Northern District of Texas, Abilene Division, seeking to restrain Petitioners and other judgment plaintiffs from any judgment collection in violation of Section 91. The District Court granted the temporary restraining order, thus permitting the Bank to obtain needed liquidity from the Federal Reserve Bank and correspondent banks and to clear checks in the normal course of business. Thereafter, the District Court after appropriate hearings entered a preliminary injunction preventing enforcement of the Judgment.

The District Court in its opinion[2] held that "final judgment" as used in Section 91 means "a judgment from which no appeal can be taken." Petition Appendix C at 23a. In so ruling, the Court considered "Congressional intent," the "plain meaning of the words," and the "context" in which the words are used. *Id.* at 11. The Court also found that "[i]f a creditor were permitted to attach bank assets before final and dispositive resolution of his state court claim," he would not only be "effecting a preference" over other creditors in violation of Section 91, but he would also "cause havoc" if an appellate court overturned or modified the original state court judgment. *Id.* at 9. The Court noted that these effects were especially "problematic" when attachment rendered the bank insolvent before the appellate court could act. *Id.* at 9-10.

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2. *United States v. MBank Abilene, N.A.*, No. 86-143K, slip op. (N.D. Tex. 1986) (hereinafter cited as Petition Appendix C).

The District Court enjoined enforcement of the Judgment after finding that, absent an injunction, the United States would be irreparably injured. Petition Appendix C at 24a-26a. The Court also found that the "threatened injury" posed by enforcement of the judgment "outweighs any potential dangers suffered by" Petitioners. *Id.* at 27a. "By granting the preliminary injunction, the Court is serving the public interest; it is protecting the bank's depositors, creditors, as well as the public at large from the premature insolvency of one of its national banks." *Id.* at 28a.

C. Circuit Court Proceedings.

After granting Petitioners' request for an expedited appeal, the Fifth Circuit affirmed the grant of the preliminary injunction in September of 1987.[3] Recognizing that the term "final judgment" can be interpreted in different ways in different contexts, the Fifth Circuit correctly looked to the purpose of Section 91 for guidance. Petition Appendix B at 9a. The history of Section 91 in the case law led the Court to conclude that in order to effectuate the anti-preference purpose of the statute, final judgment must mean "a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review." *Id.* at 12a. Final judgment must be interpreted in these terms in order to achieve the Congressional goal of "equality among the creditors of an insolvent bank." *Id.* at 10a, *citing, Pacific National Bank v. Mixter,* 124 U.S. 721, 726 (1888).

3. *United States v. LeMaire,* 826 F.2d 387 (5th Cir. 1987) (hereinafter cited as Petition Appendix B).

ARGUMENT

This case solely involves the interpretation of Section 91. Petitioners do not challenge the District Court's findings that an injunction was necessary to prevent irreparable injury, to balance properly the competing interests of the parties, and to serve the public interest. Although the interpretation of Section 91 is an important issue, the Fifth Circuit has correctly decided it. Neither this Court, nor any court of appeals, nor any district court, nor any state court in any reported decision has interpreted Section 91 inconsistently with the lower court decisions in this case. Accordingly, the Petition for Certiorari should be denied.

I. CONSIDERED IN CONTEXT THE TERM "FINAL JUDGMENT" AS USED IN SECTION 91 MUST MEAN A JUDGMENT FROM WHICH ALL APPEALS HAVE BEEN EXHAUSTED.

The central issue in this case involves the appropriate construction of the phrase "final judgment" as contained in Section 91. Petitioners contend that the term "final judgment" has the single, invariable meaning of a "trial court judgment which determines the rights of all the parties and disposes of all the issues involved in the suit." Petition at 23. In other words, they argue that "final" in all contexts must mean the same as "final" for purposes of appeal. The thrust of Petitioners' argument is that this single meaning mechanically determines the interpretation of Section 91.

The Fifth Circuit, however, correctly concluded that "[i]t is axiomatic that the meaning of final judgment varies according to context." Petition Appendix B at 7a. In

construing a portion of Section 91, this Court in *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 321 (1977), stated "[a]s always, 'the meaning of particular phrases must be determined in context'," *citing, SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969); *Haggar Co. v. Helvering*, 308 U.S. 389, 396 (1940). Petitioners cite various authorities defining the term "final judgment" to mean a judgment entered by a trial court which is appealable because it disposes of all issues. The test of "finality" for determining appealability, however, does not determine the meaning of finality for purposes of Section 91. The common theme which controls the interpretation of the phrase "final judgment," both in statutes governing appellate jurisdiction and in Section 91, is that the phrase must be interpreted in context so as to effectuate the purpose of the particular statute.

A. The Anti-Preference Purpose of Section 91.

Section 91 is an integral part of a comprehensive scheme governing the operations of national banks. As Petitioners concede and this Court has consistently held, the heart of Section 91 is the prohibition of certain preferential transfers and payments by national banks. This Congressional purpose was first discussed by this Court in *Pacific National Bank v. Mixter*, 124 U.S. 721, 727 (1888), only fifteen years after the enactment of Section 91. *Mixter* has been recently reaffirmed in *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 320 (1977). The exemption from attachments and executions prior to final judgment contained in the final clause of Section 91 is necessary to prevent national banks from making preferential payments to creditors who resort to state court

collection procedures, until the claims of those creditors are finally determined to be valid.[4]

In support of its discussion of the anti-preference purpose of Section 91, the Court in *Third National Bank* quoted a portion of the Georgia Supreme Court's opinion in *Planters' Loan & Savings Bank v. Berry,* 91 Ga. 264, 18 S.E. 137 (1893), concerning the policy underlying Section 91, which is particularly applicable to the situation confronting MBank.

> The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under State authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by Congress are to control

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4. The Judgment is highly vulnerable on appeal. Petitioners' claims are based upon a breach of an alleged commitment by MBank to loan $3 million to a corporation in which Petitioners were shareholders. Petitioners claimed that the corporation was damaged by the failure to make the loan so that when they sold their stock they received less money than they would have received had the bank fulfilled its alleged loan commitment to the corporation. Over $40 million of actual damages in the Judgment is based upon a jury charge that permitted Petitioners to recover for "lost value of stock." As a matter of law, shareholders are not entitled to recover damages inflicted upon a corporation in which they own stock due to a breach of contract between that corporation and the defendant. *Massachusetts v. Davis,* 140 Tex. 398, 168 S.W.2d 216 (1942), *cert. denied,* 320 U.S. 210 (1943). Moreover, the alleged loan commitment was made by a former bank officer, Don Earney, when the Bank was under prior ownership and management. *See United States v. Kington,* 801 F.2d 733 (5th Cir., 1986). His authority to make the commitment was disputed, and extending the loan would have violated 12 U.S.C. § 84 (1982). Nevertheless, the state trial court did not submit any jury issues concerning Earney's authority to commit MBank (then called Abilene National Bank) to make the loan. These are only a few of the most egregious defects in the Judgment.

> their own assets and resources, as against State interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment.

Third National Bank, 432 U.S. at 321, n. 13. The Court in *Third National Bank* was careful to note that its construction of Section 91 was not violative of this Congressional intent, stating:

> It is true that Congress has consistently and effectively sought to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment. But those interests are fully vindicated by our construction of the Act.

Id. at 323. Execution on a judgment pending appeal would give a judgment creditor a preference inconsistent with the purpose of Section 91 since execution would allow a judgment creditor to obtain the judgment debtor's assets before other creditors, including depositors, merely because the judgment creditor has won the race to the courthouse. The preference to Petitioners in this case would be particularly aggravated because execution would put MBank at risk of insolvency.[5]

Unlike ordinary business corporations, MBank cannot resort to the bankruptcy courts to stay execution pending its appeal. National banks are not allowed to file bankruptcy. 11 U.S.C. § 109(b) (1982). Instead of vesting broad powers with the bankruptcy courts to protect debtors and to insure fair treatment of the competing claims of creditors, Congress has created a different regime to

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5. *See* Affidavit of Phillip Hoot, Chairman of MBank, filed under seal, regarding the effect on the bank of enforcement of the Judgment.

govern creditors' claims against national banks. As part of this regulatory plan, 12 U.S.C. § 191 provides that judgment creditors of a national bank are entitled to ask the OCC to place the bank in receivership thirty days after a state court judgment has gone unpaid within the meaning of that statute. The OCC "may," but is not required by that statute, to appoint a receiver as a result of any of the factors set forth in Section 191, including the failure of a bank to satisfy a judgment. Congress vested the discretion to make this determination with the OCC, not with the courts (state or federal) or with private litigants. The preliminary injunction in no way restrained Petitioners from making an application to the OCC under Section 191. Congress intended such a petition to be the exclusive remedy afforded to Petitioners pending resolution of MBank's appeal from the Judgment.

As another part of the regulatory regime governing national banks, Section 91 provides that those who claim to be creditors have significantly fewer rights to utilize the remedies of attachment, injunction and execution than do creditors of ordinary commercial enterprises. In return, the debtor bank is subjected to comprehensive regulation and supervision of its financial affairs. The OCC is the federal agency charged with supervising and regulating the national banking system to ensure its safety and soundness for the benefit of the depositors in national banks and the general public. 12 U.S.C. § 1, *et seq.*[6]

6. The anti-preference provisions of Section 91 are carefully structured so that a national bank is not hindered in the orderly conduct of its business. *See McDonald v. Chemical National Bank*, 174 U.S. 610 (1899) (payment of checks under clearing account arrangement); *Rucker v. Kokrda*, 68 F.2d 73 (10th Cir. 1933) (withdrawal by depositor); *Nelson v. Lewis*, 73 F.2d 521 (2d Cir. 1934) (withdrawal by depositor).

Thus, Sections 91 and 191 are integral parts of a consistent scheme of federal banking regulation preventing preferences to creditors and conferring on the OCC, not the courts, the responsibility for making the inherently subjective evaluations required to determine any national bank's financial condition. Therefore, until all appeals have been exhausted, state court judgment plaintiffs cannot execute on a judgment or take any other action to enforce a judgment; they can only apply to the OCC for a receivership after their judgment has gone unpaid for thirty days. The real thrust of Petitioners' argument in its Petition is directed at the wisdom of this regulatory plan established by Congress for national banks as it impacts those who claim to be creditors by virtue of a judgment. That argument is properly addressed to Congress, not this Court.

Petitioners devote an entire section of their Petition to a contention that other creditors of MBank are receiving preferences at their expense. Petition at 25-26. The factual matters referred to by Petitioners, however, amount to nothing more than ordinary business transactions on the part of MBank. Moreover, all these matters were put in evidence at the preliminary injunction hearing, and the District Court refused to find that other creditors were being preferred over Petitioners. To the contrary, in findings not challenged as clearly erroneous in this Court or the Fifth Circuit, the District Court found that Petitioners' "potential inability to collect their judgment" must give way to the "enormous resulting hardship" that would occur if their judgment collection efforts led to the dissolution of the bank. Petition Appendix C at 27a. The facts show that MBank is paying its obligations (including obligations owed to depositors

as creditors of MBank) when such obligations become due and payable. There is no suggestion that even one of the transactions violates any applicable statute or regulation. MBank is subject to continuous supervision by the OCC and the FDIC, and neither agency has suggested that any of the transactions are improper. The preliminary injunction requires MBank to report daily its financial condition to the District Court and Petitioners. If the information so provided should disclose any improper transactions, Petitioners have an opportunity to seek appropriate relief.

Unless and until the Judgment is affirmed following all appeals, there has been no final determination that the Petitioners are creditors of MBank. Section 91 prevents Petitioners from forcing MBank to prefer them over other creditors. Petitioners' attempts to enforce the Judgment are nothing more than their efforts to obtain preferential treatment. As such, MBank's payments to creditors in the ordinary course of business are not prohibited by Section 91 and do not constitute a preference in favor of other creditors of the Bank.

B. "Final Judgment" in Other Statutes.

As the Fifth Circuit noted, the use of the term "final judgment" in other contexts illustrates that the term need not always be used as the hallmark of an appealable judgment but may mean a judgment from which all appeals have been exhausted. Certain other statutory provisions which incorporate the term "final judgment" also refer to judgments from which all appeals have been exhausted rather than an appealable trial court judgment. The statute provid-

ing for costs and fees in cases in which the United States is a party provides that a party seeking an award of fees "shall, within thirty days of final judgment in the action, submit to the court an application for fees. . . ." 28 U.S.C. § 2412(d)(1)(B) (1982). That statute defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G) (1982). Likewise, 28 U.S.C. § 2414 deals with the procedure for the payment of "final judgments" rendered against the United States. The statute states:

> Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and a judgment shall be deemed final.

28 U.S.C. § 2414 (1982). It is clear from the context of that statute that the phrase "final judgment" means one from which no further appeal can be taken and not one that is subject to appeal.

This Court has construed the phrase "final judgment" as used in a federal statute similar to Section 91 to mean "final" after all appeals have been exhausted. *Schell v. Cochran,* 107 U.S. 625, 628 (1883). The statute in question provides that "[e]xecution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts . . ." under certain circumstances set forth in the statute. 28 U.S.C. § 2006 (1982). The *Schell* Court stated:

> A writ of error in a case of this kind, being brought by direction of a department of the government,

> operates as a *supersedeas,* under sects. 1000 and 1001 of the Revised Statutes, without any bond to answer in damages being given. The plaintiff in the judgment being stayed as to execution while the case is in this court, and their being a new judgment rendered by this court in the suit, *"the final judgment" referred to in section 989 [28 U.S.C. § 2006 (1982)] is the judgment as it stands after its affirmance by this court,* and after the court below has rendered such judgment as the mandate of this court requires. (emphasis added).

Interestingly, the decision of the Court in *Schell v. Cochran* was rendered in 1883, only ten years after Congress enacted what is now codified as Section 91. What the Court understood the phrase "final judgment" to mean in this related context is a good indication of what Congress understood that phrase to mean only ten years earlier when it used that phrase in the statute for the protection of national banks.

C. The *Loew's* Decision.

While a number of reported opinions have examined Section 91, only one opinion prior to the decisions of the District Court and the Fifth Circuit in this case had addressed the issue before this Court.[7] A California state

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7. Petitioners erroneously cite *Massachusetts v. Mellon,* 262 U.S. 447, 487 (1923), for the proposition that the lack of any precedent supporting a particular construction of a statute is itself significant evidence that the newly asserted construction is incorrect. The *Mellon* court, in holding that a single taxpayer may not contest a Congressional act appropriating public funds, merely notes that it is significant that there was no precedent sustaining the right to maintain such an action although "a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect." *Id.* at 487. Thus, the *Mellon* court was not dealing with a newly asserted construction of a statute

court examined the precise issue in question in *Loew's, Inc. v. Superior Court*, 301 P.2d 64 (Cal. App. 1956). Construing Section 91, the court concluded that "final judgment" is one from which no appeal can be taken. *Id.* at 72. The court in *Loew's* reasoned that the Section 91 prohibition of writs of execution was intended to refer to the generally accepted meaning of "execution." The California court also recognized that a writ of execution commonly refers to a writ issued after the judgment of the trial court.

> Therefore, in order to make the section effective as to executions, the words "final judgment" must be held to refer to judgments from which no appeal can be taken and not merely judgments rendered.

301 P.2d at 72.

While Petitioners argue that "final judgment" as used in Section 91 must mean an appealable trial court judgment because that is the ordinary meaning of the phrase, they rely on an extraordinary meaning of the term "execution" to challenge the *Loew's* rationale. Petitioners cite authority for the proposition that executions were authorized prior to judgment in 1873, the time of enactment of Section 91. Petition at 19-20. The authority of that era makes it clear that an execution, in its *ordinary* sense, denotes a writ to enforce a judgment and not a prejudg-

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but with a novel assertion of standing by an individual taxpayer. Under the circumstances of this case, if any inference is to be drawn from the fact that only one case has considered the issue of the meaning of the term "final judgment" in Section 91, that inference should be either that only the Petitioners have sought to enforce a judgment against a national bank prior to exhaustion of appeals or that other national banks facing judgments have not needed to resort to the protection of Section 91.

ment remedy. A. Freeman, *Law of Executions* 3 (1885). The Freeman treatise states:

> There are a number of instances in the United States where, by statute, an execution may be issued without being preceded by a judgment. But the term "execution" will not in this work be used in its most comprehensive sense. It will be employed *in its most usual sense,* a sense in which it denotes a writ issued to enforce a judgment or order of a court of law, or a final decree of a court of equity.

Id. (emphasis added). Thus, the *Loew's* rationale complies with "a fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979).

D. Language in Other Cases.

Petitioners quote language in previous opinions of this Court which they contend support the proposition that Section 91 applies only to "prejudgment writs." They cite passages from *Third National Bank v. Impac Limited, Inc.,* 432 U.S. 312 (1977), *Van Reed v. Peoples National Bank,* 198 U.S. 554 (1904), and *Earle v. Pennsylvania,* 178 U.S. 449 (1900). Petition at 12-15. None of these cases, however, involved the question of whether Section 91 prohibits execution on a judgment before its validity has been determined on appeal. This Court has never focused upon the meaning of "final judgment" in Section 91. The isolated passages quoted by Petitioners do not even rise to the level of considered dicta, must less represent definitive holdings of this Court.

For instance, *Third National Bank,* on which Petitioners place so much reliance, involved whether a state court could issue an order "restraining a national bank from holding a private foreclosure sale, pending adjudication of the mortgagor's claim that the note [was] not in default." 423 U.S. at 313. The literal language of Section 91 appeared to prohibit all injunctions "before final judgment," but the Court held that the proscription applied only to the "prejudgment seizure of bank property by creditors of the bank." 432 U.S. at 324. The focus of the opinion was whether the injunction disposed of bank assets so as to prefer one creditor over another, not whether the order at issue was a "final judgment." The Court was not required to construe the phrase "final judgment." Petitioners' adroit emphasis on selected words from passages they quote out of context cannot create precedent.

II. SECTION 91 PREEMPTS TEXAS SUPERSEDEAS BOND PROVISIONS.

The provisions of Section 91 are obviously paramount over state law regarding attachments and execution upon judgments. U.S. Const. art. VI; *Pacific National Bank v. Mixter,* 124 U.S. 721, 727 (1888). Thus, Texas state law requiring the posting of a supersedeas bond to stay the enforcement of a judgment pending appeal is subject to Section 91.

Contrary to Petitioners' repetitious allegations, sovereigns are not the only entities exempt from supersedeas bond requirements. A number of states have probate[8]

8. Colorado, Mississippi, Nevada, Ohio and Oklahoma exempt executors, administrators and other estate representatives from posting a supersedeas bond on appeal, if the representative has already given security to ensure his performance in that capacity. *See* Colo. R.

or poverty[9] exceptions. Many states,[10] including Texas as of January 1, 1988,[11] as well as the Federal Rules[12] vest wide discretion with trial courts in determining whether a bond is required to stay execution during the pendency of an appeal, in effect allowing their courts to carve out exceptions on a case-by-case basis. Ohio excepts trustees in bankruptcy from supersedeas bond requirements once they have given personal bond in such capacity. Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987). Nebraska and

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App. P. 8(c); Miss. Code Ann. § 11-51-99 (Vernon Supp. 1986); Nev. Rev. Stat. Ann. § 155.200 (Michie 1985); Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987); Okla. Stat. tit. 12, § 985 (1961).

Delaware, Missouri, Nebraska and Texas have similar exemptions, but do not expressly tie the availability of the exemption to the prior giving of security. *See* Del. Const. art. IV, § 24; Ind. Code Ann. § 29-1-1-22 (West Supp. 1987); Mo. R. Civ. P. 81.09; Mo. Rev. Stat. § 512.080 (Vernon Supp. 1987); Neb. Rev. Stat. § 24-541.02 (4)(a); Tex. Prob. Code Ann. § 29 (Vernon 1980).

South Carolina and Vermont exempt any appellant from posting bond to stay a decision by a probate court, regardless of the appellant's status. *See* S.C. Code Ann. § 62-1-308(a), (c) (Law. Co-op. 1987).

9. Georgia, Michigan, North Carolina, Oregon and Tennessee exempt indigents from their supersedeas bond requirements, generally upon the appellant's oath or affidavit that he cannot afford to post the bond. *See* Ga. Code Ann. §§ 5-3-22, 5-6-47 (1982); Mich. Ct. R. 3.604 (L); N.C. Gen. Stat. § 1-288 (1983); Or. Rev. Stat. § 19.045 (2) (1983); Tenn. Code Ann. § 27-5-103 (1980).

10. *See* Mass. R. App. P. 6(b)(1); Hawaii Fam. Ct. R. 8(b); Neb. Rev. Stat. § 24-541.03(6) (1985); N.C. Gen. Stat. § 1A-1, Rule 62 (1983); N.D. R. App. P. 8(b); N.D. R. Civ. P. 62(e); Ohio R. Civ. P. 62(D) (Anderson 1982); Or. Rev. Stat. § 19.045(2) (1983); Penn. R. App. P. 1737; Utah R. Civ. P. 62(a), (g); Utah R. App. P. 8(b); Wis. Stat. Ann. § 806.08(5) (West 1987); Wis. Stat. Ann. § 808.07(2)(a)(3), (b) (West 1987).

11. *See* Tex. R. App. P. Rule 47(b) (effective January 1, 1988).

12. Fed. R. Civ. P. 62; *see also Federal Prescription Service, Inc. v. American Pharmaceutical Assoc.*, 636 F.2d 755, 757-758 (D.C. Cir. 1980); *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 176 (2d Cir.), *cert. denied*, 424 U.S. 934 (1975).

Ohio permit receivers a stay of execution during the pendency of an appeal without additional security in the form of a supersedeas bond.[13] Several states waive supersedeas bond provisions when the appellant seeks review on another's behalf.[14] Finally, Maine and Vermont generally do not require a supersedeas bond at all in order to stay execution during the pendency of an appeal, effectively exempting all appellants.[15]

Texas state chartered banks are now exempt from filing supersedeas bonds. Following the Fifth Circuit's decision interpreting Section 91 in this case, and because of the threat posed by the recent rash of enormous lender liability awards against banks, the Texas Finance Commission adopted by regulation an exemption from posting supersedeas bonds for state banks in Texas. Tex. Finance Comm'n, 12 Tex. Reg. 4169 (1987), *adopted,* 13 Tex. Reg. 54 (1988) (codified at 7 TEX. ADMIN. CODE § 3.27). That regulation closely tracks Section 91, including a definition of "final judgment" in conformity with the decisions of the District Court and Fifth Circuit in this case.

Interestingly, North Dakota has a special exemption for appellant-farmers to protect them against potential insolvency caused by the appeal bond requirement. In North Dakota, any court may stay the issuance of execution upon a judgment "whenever in the judgment of the court the strictly legal procedure in any cause will confiscate or tend to confiscate the property of any litigant

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13. *See* Neb. Rev. Stat. § 24-334 (1985); Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987).

14. Penn. R. App. P. 1736; Va. Code Ann. § 16.1-107 (1982); W. Va. Code § 58-5-14 (1966).

15. *See* Maine R. Civ. P. 62(e); Ver. R. Civ. P. 62(e).

by forcing the sale of agricultural products upon a ruinous market." N.D. Cent. Code § 28-29-04 (1974). Like the Section 91 exception created by Congress for national banks, North Dakota allows a stay of execution when the posting of the supersedeas bond would bankrupt the appellant-farmer. If the appellant must sell his agricultural goods in a poor market to meet the bond requirement, his appeal becomes futile. Even if he prevails on appeal and obtains the return of his bond, the forced sale will have bankrupt him. Section 91 provides national banks the same safeguard that North Dakota provides its farmers.

In any event, the provisions of Section 91 are sufficiently clear to operate as an exception to the Texas supersedeas bond requirement, particularly if the function and effect of a supersedeas bond is considered. The history of the writ of supersedeas and the giving of security to supersede the enforcement of a judgment is outlined in *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 382 (1883). The modern day supersedeas bond derives its name from "the effect of a writ of *supersedeas* in the English law from the superior to the inferior court." *Id.* at 397, (Miller, J., dissenting). Thus, at its inception, a supersedeas was literally a writ issued by a superior court to an inferior court, halting all executions on the inferior court judgment.[16]

16. The Freeman treatise, cited by Petitioners, states that "[a]t common law no undertaking nor other security was required," but that "[a]t the present time [1885] the rule is otherwise." A. Freeman, *Law of Executions*, 71 (1885). However, Freeman also discusses various states' rules which provided that the property of certain quasi-public corporations (toll road companies, ferries, etc.) was exempt from execution. *Id.* at 307-310. Against the background of this pre-1873 jurisprudence, it would not be startling for Congress to exempt the property of national banks from execution prior to exhaustion of appeals.

Section 91 operates as a statutory "supersedeas writ" in all cases involving judgments entered against a national bank. The statute, like the ancient English writ, is an order by a paramount authority, the Congress, prohibiting enforcements of judgments for a limited period of time, i.e., until all appeals have been exhausted and the judgment is "final."[17]

The exemption from state supersedeas requirements that Section 91 affords to national banks is not unique. Federal law also exempts other federally chartered entities by statutory provisions almost identical to Section 91.[18] The protection afforded national banks and other federally chartered institutions is part of a comprehensive scheme of federal regulation governing federally chartered financial institutions.

III. PETITIONERS' ATTEMPT TO RAISE AN ISSUE CONCERNING SUBJECT MATTER JURISDICTION IS FRIVOLOUS.

Petitioners contend, in an argument not advanced in the District Court or Fifth Circuit, that the federal court did not have subject matter jurisdiction to enjoin the

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17. Significantly, the Texas supersedeas bond provision expressly contemplates that statutory exceptions to the bonding requirement may exist. Tex. R. App. P. 47(a) provides in part: "Unless otherwise provided by law or these rules, an appellant may suspend the execution of the Judgment by filing a good and sufficient bond. . . ."

18. *See* 12 U.S.C. § 632 (1982) (protecting the Federal Reserve Banks); 12 U.S.C. § 1452(e) (1982) (protecting the Federal Home Mortgage Corporation); 12 U.S.C. § 1730(k)(1) (1982) (protecting the Federal Savings and Loan Insurance Corporation); 12 U.S.C. § 1789(a)(2) (1982) (protecting the National Credit Union Administration Board); 12 U.S.C. § 1819 (1982) (protecting the Federal Deposit Insurance Corporation); 45 U.S.C. § 822(e) (1982) (protecting the Railroad Rehabilitation and Improvement Fund).

enforcement of the judgment because such an action would make the federal court an appellate tribunal to the state court. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). Both cases cited for this proposition are clearly inapposite. In *Rooker* and *Feldman,* the plaintiffs attempted to file cases in district court challenging judicial decisions that were, by statute, reviewable only by the Supreme Court. 28 U.S.C. § 1257 (1982) (previously codified at Judicial Code § 237, 39 Stat. 726 (1916)). Neither case involved an action filed by a party which was a stranger to the initial proceeding subject to Supreme Court review under 28 U.S.C. § 1257 (1982). Had MBank filed an action in federal court seeking an injunction, a *Rooker-Feldman* issue might have been presented. Here, the United States, which was not a party to the state court proceeding and could not attack the state court's action, invoked the subject matter jurisdiction of the federal court pursuant to 28 U.S.C. § 1345 (1982)[19] in order to vindicate its federal regulatory interests.

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19. The government also clearly had standing to invoke jurisdiction under 28 U.S.C. § 1345 and bring the action. This Court stated in *In re Debs,* 158 U.S. 564, 584 (1894):

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

These principles have been followed in *Federal Home Loan Bank Board v. Empie,* 778 F.2d 1447 (10th Cir. 1985); *United States v. Marchetti,* 466 F.2d 1309 (4th Cir. 1972), *cert. denied,* 409 U.S. 1063 (1972); *United States v. Arlington County,* 326 F.2d

The injunction granted by the District Court at the request of the government does not intrude upon or impede the ongoing appeal of the merits of the state court Judgment in any manner. The District Court scrupulously avoided involving itself in the merits of the state court action. The injunction facilitates the appeal by allowing MBank unfettered access to the state appellate process, access which would be effectively denied if premature enforcement of the Judgment forced the Bank into insolvency.[20]

CONCLUSION

Review of the Fifth Circuit's affirmance of the preliminary injunction should be denied. The Fifth Circuit correctly construed Section 91 to prohibit judgment collection efforts against MBank until all appeals have been exhausted. That construction gives proper effect to the anti-preference purpose of Section 91 as part of the comprehensive federal regulation of national banks. The United States met its burden for entry of a preliminary injunction. The trial court did not abuse its discretion in granting the injunction based on fact findings which are not clearly erroneous. The District Court clearly had jurisdiction to grant an injunction sought by the United States to vindicate its regulatory interest when the United States was not a party to the state court proceedings.

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929 (4th Cir. 1964); *United States v. City of Glen Cove,* 322 F. Supp. 149 (E.D.N.Y. 1971), *aff'd,* 450 F.2d 884 (2d Cir. 1971); *United States v. Brand Jewelers Inc.,* 318 F. Supp. 1293 (S.D.N.Y. 1970).

20. The injunction likewise does not violate the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), since the United States sought the injunction. *N.L.R.B. v. Nash-Finch Co.,* 404 U.S. 138, 146 (1971); *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 226 (1957).

Therefore, the Fifth Circuit correctly affirmed the injunction.

Respectfully submitted,

JOSEPH D. CHEAVENS
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1250

Attorney for Respondent
MBank Abilene, N.A.

Of Counsel:

BAKER & BOTTS
Houston, Texas

W. MIKE BAGGETT
WINSTEAD, MCGUIRE, SECHREST & MINICK
1700 Dallas Building
Dallas, Texas 75201
(214) 742-1700

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 1988, the foregoing Brief in Opposition of Appellee MBank Abilene, N.A. was forwarded by certified mail, return receipt requested, to counsel of record as follows:

Nicholas S. Zeppos
Douglas N. Letter
Attorney, Department of Justice
Civil Division, Room 3722
9th & Pennsylvania Avenue, NW
Washington, D.C. 20530

Wayne Hughes
Assistant United States Attorney
310 U.S. Courthouse
10th and Lamar Streets
Fort Worth, Texas 76102

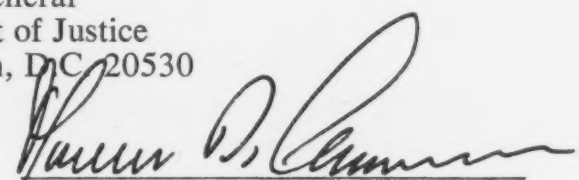
Bruce W. Claycombe
Jones, Claycombe & King
2424 Allianz Financial Centre
2323 Bryan Street, LB 159
Dallas, Texas 75201

Judith K. Sinclair
Federal Deposit Insurance Corp.
Division of Bank Supervision
1910 Pacific Avenue, Suite 1900
Dallas, Texas 75201

Frank C. Bonaventure, Jr.
Administrator of National Banks
Washington, D.C. 20219

John M. Zukowski
Campbell, Athey, Zukowski & Bresenhan
1100 Milam, Suite 2150
Houston, Texas 77002

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530



JOSEPH D. CHEAVENS

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No. 87-1048

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY LEMAIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND MBANK ABILENE, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
DOUGLAS LETTER
BARBARA C. BIDDLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 12 U.S.C. 91 prohibits attachment of the assets of a national bank prior to the entry of a final judgment against the bank from which no further appeal lies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App 3a-12a) is reported at 826 F.2d 837. The opinion of the district court (Pet. App. 13a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on October 9, 1987. The petition for a writ of certiorari was filed on December 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984 petitioners brought an action in Texas state court against respondent MBank Abilene, N.A. (MBank), alleging, among other things, breach of contract, fraud, and tortious interference with contract. Following a jury

verdict for petitioners, the trial court entered judgment against MBank for an amount in excess of $69 million. While the trial court initially stayed enforcement of the judgment, in September 1986 the court withdrew the stay order. Pet. App. 5a.

MBank did not post the $69 million supersedeas bond that was required by Texas law to stay execution of the judgment pending appeal.[1] The bank did, however, petition both the Texas Court of Appeals and the Texas Supreme Court for writs of mandamus directing the trial court to stay execution of the judgment until the appeals process was exhausted; in making this request, MBank pointed to 12 U.S.C. 91, which provides that "no attachment, injunction, or execution, shall be issued against [a national bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." Both courts denied MBank's petitions without comment. Pet. App. 5a.

On September 18, 1986, the state trial court denied MBank's motion for a new trial. That same day, petitioners caused writs of garnishment to be served on MBank's assets located in the Federal Reserve Bank of Dallas and in MBank Dallas, a subsidiary of MBank's parent holding company. The writs prevented the clearance through the Federal Reserve System of checks presented to MBank, leading to a severe imbalance in MBank's accounts and the probability of imminent insolvency. Pet. App. 4a, 24a-25a, 28a.

2. In response to these developments, the United States, acting on behalf of the Comptroller of the Currency (Comptroller) and the Federal Deposit Insurance Cor-

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[1] Texas law requires the filing of a supersedeas bond equal to the entire amount of the judgment. Tex. R. Civ. P. Ann. rr. 364-368 (Vernon 1985).

poration (FDIC), brought this action against petitioners and MBank in the United States District Court for the Northern District of Texas. Citing 12 U.S.C. 91, the United States sought an injunction against execution of the writs of attachment pending exhaustion of MBank's appellate remedies in state court. In October 1986 the district court granted the requested relief, holding that Section 91 bars the attachment of national bank assets until the entry of a final judgment against the bank from which no further appeal may be taken. Noting that the meaning of the term "final judgment" in Section 91 presented a question of first impression, the court found it "clear that Congress intended 12 U.S.C. § 91 to prohibit premature attachment of bank assets by one of its creditors," and that "[a] finding that 'final judgment' means one from which no further appeal can be taken would promote the settled congressional intent" (Pet. App. 21a). The court went on to find that failure to grant an injunction against execution of the writs of attachment would likely lead to MBank's immediate insolvency, a development that would cause irreparable harm to the Comptroller and the FDIC (see Pet. App. 24a-27a), and that "would certainly disserve [the] public interest" (*id.* at 28a).

The court of appeals affirmed (Pet. App. 3a-12a). The court explained that the only question in this case is whether the term "final judgment" in Section 91 bars the attachment of national bank assets prior to entry of a judgment on the merits by the trial court, or whether the term instead more broadly bars such attachments until all appeals have been exhausted. In answering this question, the court of appeals noted a variety of settings in which Congress has used the term "final judgment" in the second sense (see Pet. App. 7a), and it explained that a Congress roughly contemporaneous with the one that enacted Section 91 used the phrase in a similar way (see Pet. App.

8a). The court therefore found it "axiomatic that the meaning of final judgment varies according to context" (*id.* at 7a).

Here, the court found the controlling context in the background and purposes of the statute. The court explained that the anti-attachment provision was added in 1873 to an existing portion of Section 91 that "relat[ed] to preferential transfers and to acts in contemplation of in[s]olvency" (Pet. App. 9a (footnote omitted)). Looking to this background, and to this Court's decisions construing Section 91, the court of appeals concluded that the anti-attachment provision was enacted "to prevent preference or priority of claims against national banks by seizure under state authority before final adjudication of claims, and to protect the banks from the crippling effects of such seizures" (Pet. App. 10a-11a, citing *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 321 n.13 (1977)). The court therefore held that "Congress intended to and did arm the Comptroller with the lorica of an absolute proscription against the seizure of the property of a national bank before a judgment against that institution had completed the appellate process" (Pet. App. 11a).

ARGUMENT

The only question in this case is whether 12 U.S.C. 91 bars the attachment of national bank assets only until the entry of a judgment on the merits by a trial court, or whether it instead applies until the completion of the appeals process. In choosing the latter interpretation, the courts below read the statute in a manner that is entirely consistent with its language and fully implements the congressional purposes. Moreover, as petitioners recognize (Pet. 8), the question is one of first impression. Further review plainly is not warranted.

1. Petitioners argue that the term "final judgment" is generally used to signify a trial court judgment on the merits (Pet. 22-25), and they attempt to find support for this proposition in the Court's occasional description of Section 91 as prohibiting "prejudgment" attachment (Pet. 12-15). But "final judgment" is not a self-defining term. As the court of appeals noted, both Congress and this Court have often used the term to refer to a judgment that is no longer subject to appellate review, either because the appellate process has been completed or because the time for seeking review has expired. Pet. App. 7a, citing 28 U.S.C. 2412(d) (Equal Access to Justice Act); 46 U.S.C. 741, 748 (Suits in Admiralty Act); 15 U.S.C. 16(a) (Clayton Act). See 28 U.S.C. 2006 and 2414; *Schell* v. *Cochran*, 107 U.S. 625 (1883); *Russell* v. *National Mediation Board*, 764 F.2d 341, withdrawn on other grounds, 775 F.2d 1284 (5th Cir. 1985); *McDonald* v. *Schweiker*, 726 F.2d 311 (7th Cir. 1983); *Illinois* v. *Sperry Rand Corp.*, 237 F. Supp. 520 (N.D. Ill. 1965). Cf. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 n.14 (1974). And this Court's past references to the "prejudgment" application of Section 91 were not addressed to, and do not, resolve when the "judgment" is deemed to have become "final."[2]

In these circumstances, the meaning of "final judgment" " 'must be determined in context.' " *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 321 (1977) (citation omitted). Here, that context is provided by the background and purposes of Section 91. As the Court has

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[2] The Court has considered Section 91 on four occasions. *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312 (1977); *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554 (1905); *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900); *Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721 (1888). None of those decisions addressed the question of when Section 91's prohibition on attachment terminates.

explained, the anti-attachment provision was added to Section 91 in 1873, a time of financial panic that was marked by a number of bank failures (see 432 U.S. at 317, 322); the anti-attachment provision was appended by the compilers of the first revised statutes to an existing statute that prohibited preferential transfers in contemplation of insolvency (see *id.* at 317-318, 322-323). These factors have led the Court to conclude (*id.* at 321 n.13 (citation omitted)) that

> "The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under State authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by Congress are to control their own assets and resources, as against State interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment."

As the facts of this case illustrate, this policy is best fulfilled by reading Section 91 as the courts below did. As the district court explained, allowing execution of petitioners' writs could lead to the premature insolvency of MBank. And "[a] subsequent reversal or modification of that judgment by a Texas appellate court [would] be of little avail. The bank may already be insolvent and the bank's depositors and creditors [would] yield to a preference accorded to [petitioners]" (Pet. App. 22a). Immediate enforcement of the Texas trial court's judgment also would cause other, related problems that could not be remedied by reversal on appeal: insolvency would require the FDIC to pay insurance or take other steps to protect MBank's depositors, would harm "the community at large" (*id.* at 25a), and "would cause the public to lose fur-

ther confidence in the banking system" (*id.* at 28a). And once the bank became insolvent, even a reversal on appeal could not "restore the public's confidence in MBank Abilene;" "[a]s a practical matter, it would be impossible to reconstitute and reopen the bank" (*id.* at 26a). These are precisely the dangers that Congress intended to avoid when it enacted the anti-attachment provisions of Section 91.[3]

2. Petitioners' remaining contentions also lack substance. Petitioners maintain (Pet. 16-22) that Section 91 should not be interpreted "in derogation" of state law requiring the posting of supersedeas bonds. But petitioners are incorrect in presuming that Congress intended to permit the unfettered application of state law to national banks; in fact, it has long been understood that "[n]ational banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character * * * and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the [Federal] Government may permit." *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554, 557 (1905). In any event, the plain language of Section 91, by "writ[ing] into

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[3] Petitioners assert (Pet. 25-26) that the decision below accords MBank's depositors and other creditors a preference over *them*. But there can be no preference unless the bank is insolvent, which is not the case unless the petitioners' judgment is valid. Section 91 prevents a creditor from precipitating a crisis before the validity of his claim is finally established. Allowing the bank to do business in the ordinary course in the interim should not prejudice such a creditor. Petitioners also attempt (Pet. 9-11) to find support in *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312 (1977). That decision, however, held only that Section 91 does not prevent the debtor of a bank from obtaining injunctive relief against the wrongful foreclosure of its property (see 432 U.S. at 313, 324). In contrast, the Court made it clear in *Third Nat'l Bank* that the statute does "prevent[] prejudgment seizure of *bank* property by creditors of the bank" (*id.* at 324 (emphasis added); see *id.* at 323).

all state attachment laws an exception in favor of national banks" (*Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721, 726 (1888)), displaces any state law that would permit the attachment of national bank assets prior to the entry of final judgment.

Similarly, petitioners are wrong in challenging (Pet. 27-29) the jurisdiction of the district court to entertain the government's suit. Petitioners rely on this Court's decisions in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). But both of those decisions involved attempts by unsuccessful state court litigants to bring federal court challenges to the substance of the state court decisions. In both cases, this Court held that *it* was the only federal forum that could review the correctness of state court decisions. Here, in contrast, the federal suit was brought by the United States, which was not a party to the state action. And the federal suit does not challenge the merits of the state adjudication; it seeks only to enforce a federal statutory bar pending completion of the state appellate proceedings. No decision of this Court suggests that the district courts lack jurisdiction to entertain such actions. See *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987), slip op. 15-16 (Scalia, J., concurring); *id.* at 4 (Brennan, J., concurring in the judgment); *id.* at 1 (Blackmun, J., concurring in the judgment); *id.* at 2 n.3 (Stevens, J., concurring in the judgment).[4]

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[4] Similarly, this case is not controlled by the Court's decision in *Pennzoil Co.* v. *Texaco, Inc.*, *supra*, as petitioners appear to suggest (Pet. 28-29). In that case, the Court held that a federal district court should have abstained when the losing state court litigant presented it with a constitutional challenge to the Texas supersedeas bond requirement. There, however, the losing litigant did not present its federal challenge to the Texas courts (see slip op. 9-10, 12-14 & n.16); here,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
DOUGLAS LETTER
BARBARA C. BIDDLE
Attorneys

FEBRUARY 1988 -

MBank unsuccessfully sought relief under Section 91 from the Texas trial court, Court of Appeals, and Supreme Court. And here, of course, the federal suit was brought by the United States, which was not a party to the state court proceedings.

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In The

Supreme Court of the United States

October Term, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,

Petitioners,

v.

UNITED STATES OF AMERICA and MBANK ABILENE, N.A.,

Respondents.

PETITIONERS REPLY TO BRIEF OF RESPONDENTS MBANK ABILENE, N.A. AND UNITED STATES OF AMERICA

Bruce W. Claycombe
Kenneth L. King
2424 Allianz Financial Centre
2323 Bryan Street, LB 159
Dallas, Texas 75201
(214) 220-2424

Attorneys for Petitioners Harry Lemaire and Nan Patton, Independent Executrix of the Estate of Richard E. Patton, Deceased

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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I.

The purpose of Petitioners' reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari is to address the Solicitor General's contention that "there can be no preference [over Petitioners] unless the bank is insolvent, which is not the case unless the Petitioners' judgment is valid", Brief of U.S. at 7 n.3, and to correct crucial misstatements of fact by MBank Abilene, N.A. ("MBank").

II.

MBANK IS INSOLVENT AND IS MAKING PAYMENTS TO ITS OTHER CREDITORS IN VIOLATION OF SECTION 91

Both the Petitioners and the government agree that MBank is insolvent if Petitioners' state court judgment is valid. The government has sought to escape the consequences of the judgment by characterizing it as invalid, or less than valid, during the pendency of the state court appeal. The government's argument, however, is contradicted by well-settled state and federal law that judgments are presumed valid unless and until reversed. *Johnson v. Zerbst,* 304 U.S. 458, 460 (1938); *Matter of Chicago, Milwaukee, St. Paul & Pacific Ry,* 738 F.2d 209, 213 (7th Cir. 1984); *Phillips v. State Farm Mutual Auto Ins. Co.,* 437 F.2d 365, 368 (5th Cir. 1971); *Lowman v. Falsetti,* 335 F.2d 365, 368 (5th Cir.), *cert. denied* 379 U.S. 966 (1964); *Coleman v. Court of Appeals, Div. No. Two of State of Oklahoma,* 550 F. Supp. 681, 685 (W.D. Okla. 1980); *Little v. Celebrezzee,* 259 F. Supp. 9, 11 (N.D. Tex. 1966); *Aiken v. United States,* 191 F. Supp. 43, 50 (M.D. N.C.), *affirmed* 296 F.2d 604 (4th Cir. 1961); *Colleyville v. State,* 547 S.W.2d 659, 661 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

One might well question why the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") would seek to deny the insolvency of the bank if the only result is to delay the inevitable. The answer in this case, as perhaps no other, is clear. The delay in the enforcement of the judgment permitted the FDIC to redeem a $50,000,000.00 certificate of deposit which had not matured at the time the action was commenced. During the pendency of the preliminary injunction, on August 6, 1987, the FDIC redeemed the certificate of deposit and was paid over $50,000,000.00 by the bank.

Only twisted logic motivated by self-interest can justify the government's construction of Section 91. Query, the government's attitude toward the construction of Section 91 if it had held the valid judgment and Petitioners had held the $50,000,000.00 certificate of deposit? Wouldn't the government have argued that district court's denial of the presumed validity of the state court judgment amounted to a reversal of the judgment, subject to its affirmance on appeal, contrary to *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923)? Wouldn't the government have exercised its right to call upon McCorp, Inc., the sole shareholder of MBank, to contribute capital to its subsidiary to avoid its insolvency? Wouldn't it have declared, in the absence of protection of its judgment, the bank insolvent under Section 191 so that it could prevent preferential payments?

As it happened, Petitioners, despite all their efforts, because they lack the power granted to an agency of the

federal government, have been forced to sit, utterly helpless, and watch the assets of MBank dissipated and distributed to creditors. The feeling of helplessness, however, gives way to outrage with the realization that the principal beneficiary of the dissipation of MBank's assets is the protector of the public.

III.

MBANK'S MISSTATEMENTS

MBank's Statement of Facts contains several misleading statements which Petitioners are compelled to correct. In MBank's Brief in Opposition, it is alleged that a federal investigation of MBank, then called Abilene National Bank, led federal authorities to remove Abilene National Bank's management in mid 1982. In compliance with federal law, "the new MBank management continued to refuse to loan money to Petitioners' company." MBank Brief at 1. There is absolutely no evidence either in the record before this court or the record in the state proceedings in support of either of these asserted facts.

MBank further asserted that in 1984, "MBank instituted foreclosure proceedings against Petitioners on personal debts that were in default." *Id.* Nothing could be further from the truth. It was uncontroverted at the state court trial that Petitioners' notes were not in default and could not be demanded. In fact, MBank's unlawful attempt to foreclose on the collateral securing Petitioners' notes is precisely what began the state court litigation out of which this controversy has arisen.

MBank's contention that Petitioners' never raised subject matter jurisdiction in either the district court or

the Fifth Circuit, MBank Brief at 20-21, is also untrue. The very argument made by Petitioners concerning the subject matter jurisdiction of the federal courts to issue the preliminary injunction was addressed in the trial court in their Motion to Dismiss and in the Fifth Circuit in their Reply Brief at 19-20.

MBank, throughout this action, has attempted to distort the nature of the state court proceeding in an obvious effort to improperly collaterally attack the state court judgment. *See,* MBank Brief at 7, n. 4. Counsel for MBank is well aware of the inquiry they invite this court to make and that it is absolutely prohibited by this court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

Further, MBank, with no supporting authority, incorrectly argues that Congress intended 12 U.S.C. § 191 to be the exclusive remedy for Petitioners pending MBank's appeal. MBank Brief at 9. The fact of the matter is that unlike present day, at the time 12 U.S.C. § 191 was enacted, a bank's shareholders were liable for its debts. *Wheeler v. Kost,* 77 Ill. 296 (1875). Clearly, Section 191 was not the exclusive remedy of a bank's judgment creditor.

MBank's argument that 28 U.S.C. §§ 2412(d)(1)(B) and 2414 (1982) define "final judgment" as one from which no appeal can be taken, MBank Brief at 12, merely begs the question. Contrary to MBank's position, these statutes merely show that Congress, when it intends to alter the ordinary meaning of final judgment, knows that it should so define it.

MBank has distorted Petitioners' argument that *Congress* had not granted any exemptions from the requirement of posting a supersedeas bond, other than the sovereign, by noting that a number of *states* have exceptions to their supersedeas bond requirements. Nonetheless, the court will note the exemptions provided by states deal largely with those who have already posted bonds to protect creditors from dissipation of assets during the administration of an estate. Hence, no further bond would be necessary.

CONCLUSION

To uphold the Fifth Circuit by denying Petitioners' Petition for Writ for Certiorari not only results in a construction and application which wreaks havoc on the statutory scheme regulating national banks but converts an anti-preference statute into a pro-preference statute to the detriment of valid judgment creditors.

PRAYER

Petitioners respectfully request that a writ of certiorari issue.

Respectfully submitted,

Bruce W. Claycombe
Kenneth L. King
2424 Allianz Financial Centre
2323 Bryan Street, LB 159
Dallas, Texas 75201
(214) 220-2424

Attorneys for Petitioners Harry Lemaire and Nan Patton, Independent Executrix of the Estate of Richard E. Patton, Deceased